Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

MICHAEL G. HOROWITZ, Ph.D.,
Petitioner,

v.

PEACE CORPS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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January 16, 2006 *Petitioner Pro Se*

QUESTIONS PRESENTED

FREEDOM OF INFORMATION ACT

PETITIONER'S CHALLENGE TO EXEMPTION 6

1. Whether it is proper for the Court of Appeals to deny a public interest challenge to Exemption 6 by:

   a. applying a stringent standard rejected as a FOIA standard by a recent ruling of this Honorable Court; and in any event,

   b. exporting the Exemption 7(C) ruling to *de novo* review of an Exemption 6 cross-appeal, said cross-appeal in no way implicating law enforcement or confidentiality?

CLAIM FOR SEGREGABLE PORTIONS OF THE SUBJECT DOCUMENT

2. Whether the Court of Appeals may properly deny a claim for segregable portions on the grounds that *no* portion can be reasonably segregated from *inter alia* the "context" of agency deliberation?

PETITIONER'S PRIVACY ACT CLAIM

3. Whether the Court of Appeals may properly:

   a. disregard a directive of the Peace Corps Manual to place a termination report[1] in a records system after effectively finding that petitioner's resignation was forced;

   b. effectively relieve the Government of its burden to disprove that the vault of Peace Corps' Tonga Post was a repository of agency records; and

   c. presume *a priori* that electronic files materially differ from their prompt printouts?

TREATMENT OF PETITIONER'S FIFTH AND SIXTH AMENDMENT CLAIMS

4. Whether – when the context of a case alters on appeal – the Court of Appeals may fairly permit the Government to "correct … defect" in pleading below while denying petitioner like opportunity?

PETITIONER'S RULE 60(b)(1) CLAIM

5. Whether the Court of Appeals misconstructs Federal Rule of Civil Procedure 60 at (b)(1) by conflating its remedial modality with its triggers?

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[1] In agency parlance, an Administrative Separation Report (ASR). See Cert. App. at iii for glossary of agency staff and terms. (Cert. App. denotes appendix to the instant petition; App. denotes appendix to petitioner's appellate briefs (04-5065 6/2/05)).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael G. Horowitz, Ph.D. respectfully petitions for a writ of certiorari to review judgment of the instant case by the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit issued opinion October 28, 2005, but has not published it. (Cert. App. A). Mandate was stayed pending filing of the instant petition. (04-5065 12/19/05).

The United States District Court for the District of Columbia issued judgment October 12, 2001 and January 6, 2004, but has not published it. (Cert. Apps. B, C).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 552(a)(2)(A) of the Freedom of Information Act (FOIA) directs integral disclosure of a Government document, should the view expressed therein concur with a final opinion. But section 552(b)(5) permits withholding of intra-agency memoranda, while section 552(b)(6) permits the withholding of similar files whose disclosure would constitute a clearly unwarranted invasion of personal privacy.

Section 552(b) permits the disclosure of any reasonably segregable portion of a Government document, providing said disclosure does not harm an interest found protected by any of the exemptions described in subsections (b)(1)-(b)(7).

Section 552a(d)(1) of the Privacy Act entitles a citizen or permanent resident to copy any Government document pertaining to him/her that is contained in an agency records system, while section 552a(a)(5) defines said system as a group of records under agency control from which information is retrieved via personal identification.

In litigation, the Government has the burden to demonstrate that subject documents need not be disclosed under the Freedom of Information or Privacy Acts. 5 U.S.C. § 552(a)(4)(B), § 552a(g)(3)(A).

Section 7001(a)(1) of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 (2001)) generally equates the validity of electronic and manual contracts.

Fed. R. Civ. P. 60(b)(1) enables relief from adverse judgment on just terms, if disadvantage has stemmed from *inter alia* surprise by the opposing party and/or mistake of counsel. Fed. R. Evid. 201 enables judicial notice of commonly known fact within a circuit.

The PROTECT Act (P.L. 108-21 (2003)) at 18 U.S.C. § 3283 enables indictment of the sexual abuse of a minor without geographic or statutory limitation.

PRELIMINARY STATEMENT

Reflecting on this Honorable Court's *Escobedo* decision, Justice Thurgood Marshall recalled

> ... appreciation that the Government can transform an individual into an 'accused' without officially designating him as such through the ritual of arraignment.

U.S. v. Gouveia, 467 U.S. 180, 190 (1984) citing *Escobedo v. Illinois,* 378 U.S. 478 (1964)

By endorsing its star witness (former Peace Corps officer Arturo Giron), the Government – under the guise of a FOIA "defense" – ambiguously and falsely accuses petitioner of confession to the sexual abuse of an apparent minor in the Kingdom of Tonga. (cumulation of 04-5065 App. 36 at ¶5; 10/10/02 Tr. 12:17-19, 43:21-22; App. 97; 6/20/05 Appellee's Br. at 16). Because the PROTECT Act has neither geographic nor statutory limitation (18 U.S.C. at § 3283), petitioner may thus be menaced by mistaken prosecution for life. Yet since 1999, the Government has relentlessly refused – even upon order from the chief district judge – to disclose text confirming either the identity of petitioner's reported accuser or the nature of the alleged abuse.

The situation bears more resemblance to Kafka's fiction than American justice as commonly understood. Painstaking research has yet to discover a previous case where an officer of a federal civil agency allegedly obtained a confession whose text, years later, the Government refused to privately disclose to the alleged confessor. Even the Los Angeles Police Department, in its most corrupt phase,

promptly furnished its accused copies of confessions it allegedly obtained.

Petitioner seeks private written confirmation of the source and nature of the accusation against him[2] via the Privacy Act ... or alternatively via the Freedom of Information Act (including its "reasonably segregable portion" provision) or the U.S. Constitution. He also seeks leave, under Rule 60(b)(1), to adduce evidence challenging that portion of the Government's effective accusation that was presented via surprise at evidentiary hearing in district court.

KEY FACTS[3]

From January 1, 1997, Horowitz was a PCV in the Kingdom of Tonga, principally assigned to 'Atenisi Institute's University Division. (App. 13 at ¶3). In November 1998, his service was extended 14 months – i.e., until January 2000. Id.. Between December 1998-January 1999, the Tonga Post highly recommended him to UNV for service after January 2000. (Id.; App. 50-51).

On or about March 8, 1999, a Tongan complainant reportedly lodged allegation with said Post regarding Horowitz' behavior towards him 12 months previously. (10/10 Tr. Def. Ex. 4 at 1, 36:22-24, 42:21-22). The complainant initially asserted he was an 'Atenisi high school

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[2] The information is reportedly contained in, among other documents, petitioner's Administration Separation Report (ASR) – the initial subject document of the instant case.

[3] Although the Court of Appeals confirms the district court's findings as free of clear error (Cert. App. 8), it fails to confine its prefatory review of facts to said findings. Id. at 2-4, but see Cert. App. F, 04-5065 11/30/05 *Appellant's Mot. to Amend Opinion*, denied 12/20/05.

student in March 1998, but the Post was unable to confirm that assertion. (10/10 Tr. Def. Ex. 4 at 1, 198:15-22). He also claimed he'd been under 18 in March 1998, but was unable to verify age. (10/10 Tr. 39:14-15, Def. Ex. 4 at 1). The morning after reportedly lodging allegation, the reported complainant approached Horowitz for compensation. (10/10 Tr. Def. Ex. 4 at 1, 194:14-195:15, 195:17-20, 204:1-9).

Informal adjudication of Horowitz' administrative separation was conducted between March 10-16 (App. 34 at ¶4, 35 at ¶19), Horowitz denying the dramatic portion of the allegation on March 10 (10/10 Tr. 105:18, 191:6-8), then retaining local counsel the morning of March 12. (Pl. Ex. 1 at 1, App. 176:4-12). Former Post director Giron alleges Horowitz "essentially admitted" the alleged "incident" on March 10 (App. 36 at ¶5) ... then fully conceded it the afternoon of March 12. (10/10 Tr. 43:21-22).[4] On March 15 Horowitz' counsel, Lopeti V. Foliaki – outgoing director of the Tongan bar association and former San Francisco Consul for the Kingdom (App. 47 at ¶9, 174:24-175:1) – told Horowitz Giron had warned him that morning the PCV would soon be administratively separated solely on the basis of the complainant's allegation. (10/10 Tr. Pl. Ex 1 at 1, 10/10 Tr. 153:15-17, 155:19-25, 157:20-21, 159:15-25, 185:18-19).

March 16 was the final session of informal adjudication of Horowitz' separation; on that afternoon, the PCV – in the words of the Court of Appeals – "... had to chose between two unpalatable alternatives" (Cert. App. 10) – i.e., resignation, or having his ASR promptly forwarded to Washington (10/10 Tr. Def. Ex. 6 at 2-3), which, under the

[4] The record shows Horowitz denying the dramatic portion of the allegation on March 10, then incrementally contesting key details from March 12. (04-5065 6/6/05 Appellant's Br. at 20-21).

Peace Corps Manual, spells administrative separation. (Cert. App. 80 at § 4.5.2). To protect his UNV application from what he suspected was a slanderous ASR (10/10 Tr. 217:19-25), Horowitz pledged to resign, submitting resignation the following morning to acting Post director Olsonoski. (App. 35 at ¶¶19-20). For his part, Giron placed Horowitz' ASR in his Post's vault prior to departing for the U.S. on the evening of March 16. (Cert. App. 61-62 at ¶15; 10/15 Tr. 72:24-73:9).

COURSE OF PROCEEDINGS

After exhausting administrative remedy, Horowitz filed the instant action in April 2000 in order to obtain his ASR under the Privacy and FOI Acts. In October 2001, the district court issued summary judgment that 1) under FOIA awarded Horowitz a key fact in the ASR – the identity of the reported complainant, yet 2) denied him the document under the Privacy Act. (Cert. App. 28-36). In January 2004, after evidentiary hearing in October 2002, the district court denied Horowitz the integral ASR under FOIA, while neglecting to evaluate the document for reasonably segregable portions. (Cert. App. C). It also adopted *en toto* the Government's proposed factual findings. (Cert. App. 41-42 citing Cert. App. D.).[5]

In October 2005 the Court of Appeals reversed the district court's FOIA order to disclose the complainant's identity by granting the Government Exemption 6 ... yet affirmed judgment below in all other respects. (Cert. App. A). It as well found that – other than the complainant's identity –

[5] Thereby revealing it is not persuaded that Giron warned either Foliaki or Horowitz about the PCV's imminent separation, nor sought to force the Volunteer's resignation. (Cert. App. 62-63 at ¶16). Accordingly, it finds the ASR a "draft" (Id. at 42 n.3) because Giron had not decided to separate Horowitz upon drafting it. Id. at 44.

no portion of the ASR was reasonably segregable from the "content or context" of the Tonga Post's deliberation. Id. at 8.

In May 2000, petitioner filed a related civil rights action in district court that has been stayed pending disposition of the instant case. Civ Act No. 00-1195.

EXPLICATION OF THE CASE

I. Petitioner's Privacy Act claim should be sustained because: A) the Peace Corps Manual effectively requires an ASR to be placed in a records system when the resignation of a PCV is forced, as the Court of Appeals effectively finds in this case; B) the Government failed to carry burden to disprove that the vault of Peace Corps' Tonga Post is a repository of agency records; and C) the Government failed to carry burden to disprove that the ASR was never retrieved by name, such retrieval being required in the D.C. Circuit to sustain a claim.

A. Court of Appeals Effectively Finds that the Post's Decision to Administratively Separate Horowitz *Precedes* his Resignation

In its *de novo* review of the Government's Exemption 6 claim, the Court of Appeals concedes that Horowitz:

> ... had to choose between two unpalatable alternatives. It is difficult to see how the Peace Corps' long-established procedure of allowing volunteers to resign rather than face public charges of misconduct could be deemed improper.

(Cert. App. 10).

Since the court acknowledges that law enforcement was never implicated in the instant case (Id. at 11 n.2, 14), the choice to which it must surely be referring is the choice Horowitz had to make during the final session of informal adjudication of his administrative separation – i.e., during the final confrontation with Giron and Olsonoski late Tuesday afternoon, March 16, 1999. At said session, Giron reports that:

> ... I had the draft document with me during the meeting, either on top of the conference table at which we were sitting or in my hands, and therefore the document itself, as an object, may have been visible to [Horowitz] but its contents were not shown to him ... During this meeting and at other meetings, I afforded [Horowitz his] rights, and therefore I notified him of some of the same information that is contained in the draft document ...

(App. 38-39 at ¶¶18-19).

In an earlier memo, Giron recounts what next occurred:

> ... we told him that we would be submitting the administrative separation report on him to Washington ... We also probably told him that he could resign at that point prior to submission of any AS report and that the actual submission of the ASR would constitute our final decision to separate him.

(10/10 Tr. Def. Ex. 6 at 2).

To appreciate the extent of Giron's admission, one must evaluate the director's memo in the context of agency Manual Section 284. The MS284, which Horowitz had been directed to review the previous week, informs PCVs that

ASRs are only forwarded to the Office of Volunteer Services/Special Services (VS/SS) *post*-decisionally:

> If a V/T resigns after the decision to administratively separate has been made but before the process has been completed, the Administrative Separation Report must be completed and forwarded to VS/SS.

(Cert. App. 80 at § 4.5.2).

Director Giron must surely have known then that, with respect to ASRs, PCVs reviewing the MS284 had to conclude that "if it leaves the Post, you're toast" – i.e., if the ASR is forwarded to Washington, the PCV will be separated.

Consequently, on *de novo* review the Court of Appeals correctly finds that Horowitz "... had to choose" on March 16, though the dilemma would be more precisely described as a choice between resignation and administrative separation, as previously faced by PCV Peitz in 1995. *Peitz v. Peace Corps* 97-5159 (D.C. Cir. 1997), summary affirmance of Mem. Op., Civ Act No. 96-622 (D.D.C., May 12, 1997); but see 96-622 Def.'s Statement of Material Facts as to which there is no Genuine Issue at ¶2; all in 04-5065 6/20/05 Addendum to Appellant's Reply Br.

Clearly, the Tonga Post could not have credibly threatened Horowitz with administrative separation if it had not been prepared to execute separation. Accordingly under MS284, it was required to place Horowitz' ASR amidst agency records, because its decision to administratively

separate was effectively made prior to the PCV's resignation.[6]

B. The Appellate Court Effectively Relieves the Government of its Burden to Disprove that the Vault of Peace Corps' Tonga Post is a Repository of Agency Records

The district court found that the Tonga Post initially retained Horowitz' ASR in its safe. (Cert. App. 61-62 at ¶15) ("... in a safe in the Peace Corps' offices in Tonga"). Horowitz additionally testified that Giron warned him the ASR would be so retained for one year – i.e., until March 2000. (10/10 Tr. 218:7-9, and see Appellee's Br. at 34, where the Government relies on this testimony).

Yet the Court of Appeals finds crucial two declarations by agency officers, who in summary motion declare they are unable to locate Horowitz' ASR among agency records. (Cert. App. 15). Yet the declarations are hardly decisive.[7] The record

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[6] Petitioner thus argues that, on *de novo* review, the Court of Appeals effectively finds clear error in the district court's finding at ¶16 (Cert. App. 62-63) that no duress precipitated resignation ... and further contends that the appellate court's effective vacation of said finding sustains his FOIA claim to the integral ASR. Yet in deference to the privacy of all parties, he remains willing to conditionally dismiss his FOIA claim upon sustainment of his Privacy Act claim. (Appellant's Reply Br. at 21).

[7] See e.g. *Londrigan v. FBI(I)*, 670 F.2d 1164, 1174-75 (D.C. Cir. 1981), where an affidavit not based on personal knowledge was insufficient to support summary denial of a Privacy Act claim; see also *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 844-45 (D.C. Cir. 1980) quoting *Hayden v. Nat'l Security Agency*, 608 F.2d 1381, 1387 (DC Cir. 1979) ("[summary judgment is only appropriate] if the affidavits provide specific information sufficient to place the documents within the exemption category ...")

reveals the searches were undertaken in October 2000 (App. 41; 00-848 #21, Exs. 6,7) – nearly seven months *after* the date Giron indicated the ASR would be removed from Post.

Moreover, said court presumes these officers had knowledge of every record system in their agency, even an informal one created nearly 19 months previously. Indeed, a review of the declarations demonstrates the officers looked in all the wrong places – e.g., in Horowitz' principal Volunteer file at Post and VS/SS files at headquarters, where the parties concur the ASR was never sent. Id..

The appellate court next notes that, on summary motion, *Horowitz* failed to prove his ASR was, in fact, stored among agency records. (Cert. App. 15). But as the court surely knows, on summary motion the onus was on the *Government* to prove the ASR was not so stored. And there simply is no probative evidence disproving that – by retaining the ASR in its vault – the Tonga Post did not store Horowitz' ASR among other sensitive records under its control.

C. The Appellate Court Relies on a False Presumption about Electronic Formats to Relieve the Government of its Burden to Disprove that Horowitz' ASR was never Retrieved

It is unsettled whether a record must actually be retrieved to be subject to the Privacy Act. *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1460 (D.C. Cir. 1996); but see *Williams v. Dep't of Veterans Affairs*, 104 F.3d 670, 674-77 (4th Cir. 1997). And in the instant case, the chief district judge found the ASR qualified as a record under the

Act. (App. 118-19) (" ... no real debate between the parties about the fact that the document at issue here is a 'record' for the purposes of the Privacy Act ...").

But assuming the retrieval requirement *arguendo*, the Government stipulates the ASR was electronically retrieved by Horowitz' name on March 16, 1999 at 3:12 p.m ... then immediately e-mailed to headquarters. (App. 40). In declaration, Giron further concedes the printout was "visible" to Horowitz when the director later met with the PCV and Olsonoski. (App. 38-39 at ¶¶18-19; see also 143 at ¶15). And in hearing, Giron admits to meeting with Olsonoski and Horowitz "... very, very shortly thereafter" e-mailing the ASR to headquarters. (10/10 Tr. 58:18-22).

Yet in *de novo* opinion the appellate court presumes – absent supporting evidence – that, in the eyes of the Privacy Act, the electronic file retrieved by Giron is not the same document as its very prompt printout. (Cert. App. 15) (" ... involved an electronic copy, not the physical document in the safe."). Moreover, said court again overlooks who carries the burden under Open Government law.[8] It appears to require Horowitz – on summary motion below – to somehow cajole Peace Corps into revealing other sensitive documents its Tonga Post may have retrieved from its vault. Id. ("... Horowitz has not shown that [other] files in the safe are, in practice, retrieved by individuals' names ... "). Were such persuasion routine, district courts might dispense with discovery before evidentiary hearings.

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[8] By Open Government law is meant FOIA, the Privacy Act, Government in the Sunshine Act, and the Federal Advisory Committee Act. See *Litigation under the Federal Open Government Laws 2004*, Harry A. Hammitt et al., eds. Washington, DC: EPIC Publications, 2004.

Because the court's *a priori* presumption about printouts is cybernetically false[9] and – in the instant case – evidentially baseless, it fails to relieve the Government of its burden. It is simply indisputable that, on summary motion, the Government was unable to refute an obvious truth – i.e., that on March 16, 1999, a valid format of Horowitz' ASR was retrieved by Peace Corps' Tonga Post.

II. FOIA Exemption 6 should be denied because the reported accuser apparently sought to blackmail petitioner and, for that and other reasons, there is a public interest in petitioner's forced resignation

A. The Court of Appeals Improperly Holds Horowitz to the *Ray* Standard cited in *Favish*

In finding Horowitz' public interest challenge "virtually nonexistent" (Cert. App. 10), the appellate court exports a recent Exemption 7(C) ruling of this Honorable Court – *National Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004) – to the Government's cross-appeal claiming Exemption 6. *Favish* requires requesters of law enforcement information to overcome privacy interests by producing

> ... evidence sufficient to warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.

541 U.S. at 174.

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[9] e.g., the Electronic Signatures Act generally equates the validity of electronic and manual contracts. 15 U.S.C. § 7001(a)(1) where the validity of an electronic contract may not be denied "... solely because it is in electronic form."; see also p. 24 *infra* quoting *Williams* at 676.

Yet the Court of Appeals applies the *Ray* standard later cited in *Favish* to Horowitz' public interest challenge – i.e., it finds that, with respect to the PCV's allegation that he was abandoned to apparent blackmail, Horowitz failed to offer the "'clear evidence' required to overcome the presumption that Peace Corps' official conduct was proper." (Cert. App. 10 citing *Favish* at 174 citing *Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)).

But the appellate application of *Ray* is erroneous for two reasons:

1. *Favish* Explicitly Declines to Hold FOIA Requesters to the *Ray* Standard

While *Ray* may be a "working principle" in general litigation against the Government, it is too severe a test to be applied to public interest challenges to privacy interests under FOIA. *Favish* at 174 ("Given FOIA's prodisclosure purpose ... the less stringent standard we adopt today is more faithful [than *Ray*] to the statutory scheme.").

2. *Favish* Explicitly Confines its "Sufficient Evidence" Standard to Requesters challenging Exemption 7(C)

Under *Favish*, the "sufficient evidence" standard is only required to sustain a public interest challenge to Exemption 7(C) ... and this Court explains therein why said standard is so confined. Id. at 165-66. The "marked contrast" between Exemptions 6 and 7(C) is not due to "mere accident in drafting"; indeed, the reason for the demarcation is that law enforcement investigation – unlike general research –

often implicates people whose "... link to ... official inquiry may be the result of mere happenstance ..." Id..

B. Misapplication of the *Ray* Standard Prejudices the Appellate Court against the Evidence before it

In erroneously holding Horowitz' challenge to the *Ray* standard, the Court of Appeals again loses its evidential bearings by improperly disregarding: 1) evidence regarding apparent blackmail; 2) the Government's refutative burden regarding said blackmail; and 3) major media coverage of Horowitz' forced resignation.

1. Evidence of Apparent Blackmail

In summary motion in district court, Horowitz alleged that his reported accuser – the morning after reportedly lodging complaint at Post – sought the PCV out to request compensation.[10] (App. 47-48 at ¶10 correcting App. 18-19; repeated at hearing 10/10 Tr. 204:1-9). And Peace Corps never disputed Horowitz' allegation in pleading. (04-5065 6/20/05 Appellant's Reply Br. at 27).

Nor *could* the agency so dispute. In Giron's memo to headquarters on March 13, 1999, the director flatly refers to complainant's compensatory request of March 9 as a "fact." (10/10 Tr. Def. Ex. 4 at 1).

With Horowitz reporting complainant's request for compensation on March 12 (10/10 Tr. 194:3-196:1), and

[10] Petitioner holds that, under circuit precedents, complainant's apparent blackmail ploy vitiates his privacy interest. (04-5065 6/20/05 Appellant's Reply Br. at 29).

Giron confirming it the following day, what other evidence of apparent blackmail might the appellate court require? Inasmuch as the court reversed an order below to disclose complainant's identity, hasn't Horowitz done everything possible to confirm the apparent shake-down? Yet, misled by *Ray*, the court finds Horowitz failed to submit sufficient evidence to justify further inquiry into Peace Corps' response to apparent blackmail. (Cert. App. 10).

2. The Government's Refutative Burden

The appellate court further errs when it requires Horowitz to *prove* said blackmail. (Cert. App. 10) ("... he has not offered the 'clear evidence' required ... "). Clearly, the burden in district court was on the Government to dispute the allegation of attempted blackmail. But as it neglected to do so in pleading, it ought to suffer the adjudicative consequence.

3. Major Press Coverage of Horowitz' Forced Resignation

It is ironic that the Court of Appeals effectively chooses to second-guess a legal columnist of the *Washington Post* regarding whether inquiry into Horowitz' forced resignation is in the public interest.[11] Yet so misled is the court by the *Ray* standard that it declines to even note *Post* coverage of Horowitz' forced resignation, despite the fact said coverage was commonly accessible in its circuit. 04-5065 10/14/05 Order denying notice of media coverage material to appeal; but see Fed. R. Evid. 201(b), "Personal Personnel Records: Access Denied," James V. Grimaldi, *Washington*

[11] Logically, determination of the public interest must ultimately rest with the public.

Post, May 1, 2000 at F31 in 6/20/05 Addendum to Appellant's Reply Br.

C. Summary of Point II

Petitioner's challenge to Exemption 6 should be sustained because there is public interest in the fact that the Tonga Post abandoned him to apparent blackmail before forcing his resignation. For confirmation of forced resignation, see pp. 7-9 *supra* citing Cert. App. 10.

III. Petitioner's claim for reasonably segregable portions ought not be arbitrarily denied

Besides the identity of the complainant, petitioner is entitled to reasonably segregable portions of the ASR, including the complainant's allegation, as well as identities and allegations of PCVs and other informants. (04-5065 6/6/05 Appellant's Br. at 34). Yet in *de novo* review, the Court of Appeals denies the claim in terse blanket fashion. (Cert. App. 8) (" ... any attempt to segregate non-deliberative portions would effectively disclose the content and context of intra-agency deliberations.").

A. The Appellate Court's Standard for Testing Segregability is Arbitrary

Horowitz holds that disclosure of the "context" of agency deliberation is far too broad a standard for testing segregability. For more reasonable guidelines, see Attorney General's Memorandum on the 1974 Amendments at I-C in *Freedom of Information Act and Amendments of 1974* (P.L. 93-502) – Source Book, 99th Cong., 1st Sess. (Joint Comm. Print, Mar. 1975), pp. 507-38 in Addendum to Appellant's

Reply Br. Nor is it possible to imagine how the identity of PCVs and other informants might compromise the "content" of the Tonga Post's deliberation, especially in light of the fact that Peace Corps itself never raised this point regarding disclosure of the complainant's identity.

B. The Court Fails to Follow Precedent regarding "Express Finding"

The appellate court was wrong as well to deny Horowitz' claim in blanket fashion. To enable petition here, circuit precedent entitles requesters to an express finding of segregability regarding each claimed portion. *Krikorian v. Dep't of State,* 984 F.2d 461, 467 (D.C. Cir. 1993) quoting *Powell v. U.S. Bureau of Prisons,* 927 F.2d 1239, 1242 & n.4 (D.C. Cir. 1991); *Mead Data Cent. v. Dep't of the Air Force,* 556 F.2d 242, 261 (D.C. Cir. 1977).

IV. Petitioner's 60(b)(1) claim should be sustained because: A) the Court of Appeals misconstructs Rule 60(b)(1) and B) there are compelling reasons to grant the requested relief

A. The Court of Appeals Confirms that Horowitz was Surprised by Exhibits at Hearing ... but then Errs by Requiring him to Prove the Surprise "Unjust"

Petitioner argued in district court that a key "fact" found by the court (i.e., Cert. App. 59 at ¶9) was derived from a surprise exhibit the Government sprang at evidentiary hearing. (App. 65 citing *inter alia* 10/10 Tr. Def. Ex. 4). Invoking Fed. R. Civ. P. 60(b)(1), Horowitz asked leave to

adduce evidence contesting *inter alia* the unexpected exhibit. (App. 59-75).

Although not disputing that some of its exhibits were unexpected, the Government responded by arguing that such presentation was the consequence of a "strategy" – rather than "mistake" – of Horowitz' counsel. (App. 78-79). And the district court adopted the Government's response as its rationale for denying claim. (App. 161-62)

Upon review, however, the Court of Appeals sustains Horowitz' argument that the Government exploited a "mistake" of counsel to lodge exhibits by "surprise." (Cert. App. 17). Yet because the court fails to find the exploitation "unjust," it affirms denial of claim. Id. ("[Horowitz fails to] explain why any surprise was unjust rather than a result of a mistake by his attorney.").

But the appellate court misconstructs Rule 60(b)(1). Said rule does not require a litigant to prove surprise unjust: it only directs that *if* a litigant suffers "mistake" and/or "surprise," s/he may be relieved from final judgment "upon such terms as are just.". See e.g. *Conley v. Gibson,* 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome ..."). By only asking to adduce evidence rather than vacate judgment (App. 70-71), Horowitz conformed his 60(b)(1) claim to the "just terms" requirement.

Yet assuming *arguendo* that Horowitz must prove injustice he, in fact, showed in district court the corrosion that stemmed from "uncritical" reliance on Def. Ex. 4, the most noxious of the Government's surprise exhibits. (App.

59). And in reply to the Government's appellate response, he demonstrated why mistake by his former counsel ought to have been excused below. (Appellant's Reply Br. at 25-26).

B. There are Compelling Reasons to Grant Evidentiary Relief

1. The Exhibit informing the District Court's Finding at ¶9 is easily Contested

The contested exhibit alleges that at 4 p.m., March 12, 1999, Horowitz "... admitted to the incident" alleged by complainant, the alleged "incident" being equated by the Government on appeal with "sexual abuse." (10/10 Tr. Def. Ex. 4 at 1, App. 97). Based on said exhibit, the district court found that "Mr. Giron recalls that Mr. Horowitz recognized the incident, but explained to Mr. Giron that the incident was consensual ..." (Cert. App. 59 at ¶9). Yet in his 60(b) claim in district court, Horowitz argued he retains compelling evidence disputing his very *presence* before director Giron that afternoon. (App. 65).

2. If said Finding is Memorialized, it might Unfairly a) Prejudice Horowitz' related Civil Rights Action, and b) Menace his Legal Security for Life

There are serious consequences to memorializing the district court's Finding at ¶9. The Tonga Post initially alleged said incident involved an "apparent" minor. (10/10 Tr. 12:14-19). As noted *supra*, the Government on appeal escalated its description of allegation to "sexual abuse." (App. 97). Thus, a zealous prosecutor might mistake a false finding with admission to sexual abuse of a minor. And

because the PROTECT Act recognizes no geographic or statutory limitation, Horowitz might be menaced for life by such prosecution. 18 U.S.C. § 3283.

Moreover, said finding might be exported to – and thus prejudice – Civ Act No. 00-1195, a related civil rights action stayed since October 2000, pending disposition of the instant case.

Given the corrosive potential of Finding at ¶9, it is difficult to imagine how justice is served by the courts continuing to shield from contest the Government's surprise exhibit that informed the finding.

V Petitioner's appellate claim under the Fifth and Sixth Amendments ought to be heard because: A) on appeal, the parties acknowledged a substantial change in the context of the instant case, and B) in consequence, the Appeals Court permitted the Government to "correct ... defect" in pleading below.

A. The Stakes of the Instant Case Increased Substantially on Cross-Appeal

It is common ground among the parties that the Government raised the stakes of its FOIA "defense" when, in initial submission on cross-appeal in April 2004, it suddenly described complainant's allegation as "sexual abuse." (App. 97). Previously, the district court had only found complainant's allegation to be "potential sexual misconduct" viewed legally in the light of "prohibition [sic] on homosexual activity in Tonga." (Cert. App. 55 at ¶2, 57-58 at ¶6 n.1(c)).

Because 1) the Tonga Post initially alleged complainant's minority (10/10 Tr. 12:17-19), and 2) sexual abuse and minority together implicate the PROTECT Act, and 3) the district court found (albeit ambiguously) that Horowitz "... recognized the incident ..." (Cert. App. 59 at ¶9), the Government's FOIA "defense" has become *de facto* criminal prosecution. In May 2004, he so informed the district court and claimed the Sixth Amendment (App. 59) ("... said transformation entitles [Horowitz] to the text of the accusation against him under the Sixth Amendment."). He then raised both the Fifth and Sixth Amendments in appellate brief. (Appellant's Br. at 30-33, Reply Br. at 7-9).

B. Having Permitted the Government to "Correct ... Defect" in Pleading below, the Court should Allow Horowitz to do Likewise

Far from deploring this altered appellate landscape, the Court of Appeals seems to welcome it, all but commending the Government for escalating its description of its withheld allegation from homosexuality to "sexual abuse." In the appellate court's view, it is no longer necessary for Peace Corps to be as "discreet" as it was below; indeed, the agency is now free to "... correct this defect [of discretion] on appeal." (Cert. App. 9).

But if on appeal the Government is permitted to escalate its FOIA "defense" into *de facto* criminal prosecution, Horowitz ought to be allowed to raise his constitutional right to text revealing the source and nature of the accusation against him. Why should the Government be permitted to tune its description of a withheld accusation according to the forum in which it pleads? And if it is so allowed, why should the court refuse to treat Horowitz'

constitutional response? Indeed, in the face of the Government's sudden escalation of accusation on appeal, why should petitioner's constitutional claims *not* be newly heard?

CONFLICTS PRESENTED

Between the D.C. and Fourth Circuits:

PRIVACY ACT

1. The D.C. Circuit holds that:

   a. in order to qualify as a records system, records therein must be actually retrieved via personal identification. (Cert. App. 15 quoting *Henke v. U.S. Dep't of Commerce,* 83 F.3d 1453, 1460 (D.C. Cir. 1996)). But in a case involving a veteran's health records, the Fourth Circuit rules that actual retrieval is unnecessary:

> This close textual reading by courts of the statutory language and OMB implementing guidelines appears to focus on the trees at the expense of the forest. The careful analysis of the *Henke* court, for example, is suffused with the sense that the language of the Act is not so plain after all, but rather is ambiguous, although the court never comes out and says so ... We find the narrow *Henke* rationale ... unconvincing in these circumstances ...

Williams v. Dep't of Veterans Affairs, 104 F.3d 670, 674-77 (4th Cir. 1997).

b. in the eyes of the Act, electronic files materially differ from their printouts. (Cert. App. 15) ("[Retrieval of Horowitz' ASR] involved an electronic copy, not the physical document in the safe."). But in *Williams*, the Fourth Circuit predicts that:

> ... surely at some point federal agencies must acknowledge that computer files are like paper documents, floppy disks are like file folders, and hard drives are like file cabinets.

104 F.3d at 676.

Between the D.C. Circuit and a ruling of this Hon. Court:

FREEDOM OF INFORMATION ACT

EXEMPTION 6

2. The Court of Appeals doubly misuses this Court's *Favish* ruling by: a) applying the *Ray* standard rejected therein and, in any event, b) exporting the Exemption 7(C) ruling to *de novo* review of an Exemption 6 cross-appeal that does not implicate law enforcement or confidentiality.

Between the D.C. Circuit and U.S. Statute:

ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

3. The Court of Appeals presumes as a matter of law that an electronic file does not implicate its prompt printout, even absent evidence of material difference. But analogously the Electronic Signatures Act

generally equates the validity of electronic and manual contracts. 15 U.S.C. § 7001(a)(1) where the validity of an electronic contract may not be denied "... solely because it is in electronic form."

PRIVACY ACT

4. The Court of Appeals effectively relieves the Government of its burden to disprove that a subject document was placed in an agency records system.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. Maintaining the Integrity of Open Government Law is Vital to Public Knowledge

This Honorable Court holds that Open Government law is a "structural necessity in a real democracy." *Favish* at 172. This is especially true this winter: the Justice Department's Special Counsel has recently indicted the Vice President's Chief of Staff for misleading an investigation authorized by Congress. Open Government law – unmitigated by appellate retrenchment – is urgently required by the public to advance related inquiry.

A propos, the ranking Democrat on the Senate Judiciary Committee warned last year that:

> The enactment of FOIA was a watershed moment for democracy. [Yet] This bulwark of open Government is under assault ... But I hope it can always be said that each generation of Americans did all that it could to preserve the public's right to know for the next generation of Americans.

Statement of Senator Patrick Leahy, Subcommittee on Terrorism, Technology, and Homeland Security, March 15, 2005.

That task here falls on petitioner and this Honorable Court.

A. The Courts must continue to hold the Government to its Burdens, as Congress intended

Enforcement of the burden of proof places probative onus on the Government and helps tip the balance towards disclosure, as Congress intended.

In the instant case, the Court of Appeals improperly shifts burden to Horowitz at three junctures, requiring him to prove on summary motion that:

- the Tonga Post's vault was a repository of agency records. (Cert. App. 15; see p. 11 *supra*);
- sensitive files therein are retrieved by individuals' names. Id.; see p. 12 *supra*;
- the complainant's "purported blackmail attempt" actually occurred. (Cert. App. 10-11 n.1; see p. 16 *supra*).

B. Absent Evidence to the Contrary, Different Formats of the Same Document must continue to be Presumed Materially Identical

The presumption of material identicalness of a document's electronic and printout formats – absent evidence of difference – prevents computerized Government from evading Open Government law by contriving false

dichotomy. Without such presumption, document litigation in the computer age would devolve into chaos.

Indeed, five days after the Court of Appeals posted opinion in the instant case, *Access Reports,* the journal of Open Government advocacy, challenged the court's *a priori* presumption that electronic and printout formats are – as a matter of law – materially different:

> ... [Hon. Cir. Judge] Brown's insistence that the [ASR] has two separate existences – as a hardcopy record and as an electronic record – and that the dissemination of the electronic version somehow does not implicate the hardcopy version doesn't make sense and would allow agencies to avoid violating the Privacy Act if they disclosed an electronic version of a document as long as they didn't disclose the hardcopy version ....

Access Reports, 31:21 at 5.

C. FOIA's Clear Distinction between Law Enforcement and General Information must continue to be Respected

While the *Favish* standard controls public interest challenges to Exemption 7, it ought not control such challenges to Exemption 6: i.e., it is vital that the distinction between law enforcement and general information be scrupulously maintained. Otherwise, federal courts might export the *Favish* standard to *all* FOIA requests for private information, thereby chilling general inquiry.

D. Detailed Findings of Segregability must continue to be Required under FOIA

Detailed findings of segregability are an indispensable component to the exposure of Government action, as they often enable appeal of improper withholding of facts.

II. Open Government Law must be Uniform throughout the Circuits

By finally adjudicating the instant case, petitioner prays this Honorable Court to ultimately clarify whether:

PRIVACY ACT

- The reach of the Act is confined to only those record systems that agencies formally acknowledge (see Cert. App. 15) ("... not maintained in the Peace Corps's official files."); but see U.S.C. § 552a(a)(5);

- In order to qualify as a records system under the Act, records therein must be actually retrieved; see Id. citing *Henke*; but see *Williams* at 674-77 ("We find the narrow *Henke* rationale ... unconvincing ...").

- Even in the absence of evidence of material difference, the retrieval of an electronic file does not implicate its prompt printout; see Id. ("... involved an electronic copy, not the physical document in the safe."); but see U.S.C. § 7001(a)(1); *Williams* at 676 ("... computer files are like paper documents ... hard drives are like filing cabinets.").

FREEDOM OF INFORMATION ACT
EXEMPTION 6

- A public interest challenge to a privacy interest 1) need only lodge a reasonable suspicion of Government action, or 2) satisfy the *Ray* standard for non-FOIA litigation against the Government ("... clear evidence" of Government impropriety), or 3) satisfy the *Favish* standard for obtaining law enforcement information ("... evidence that would warrant a belief ... that ... Government impropriety might have occurred.").

III. Fair Application of Rule 60(b) and the Sixth Amendment is Vital to the Rights of the Accused

Federal Rule of Civil Procedure 60(b) is the final recourse of the accused, after the Government has surprised him or her with adverse evidence at trial or hearing. And consistent with Justice Marshall's reading of *Escobedo* (p. 3 *supra*), the Sixth Amendment ought to become available to a citizen when s/he is criminally accused by his/her Government.

QUALITY OF PETITIONER'S ADVOCACY

From June-December 2004, petitioner was represented *pro bono* on appeal by Jenner & Block, a national law firm expert in access and constitutional issues. Should certiorari be granted, petitioner is confident he could retain similar assistance here.

CONCLUSION

Open Government law carries a presumption of disclosure. *Favish* at 174.

It is difficult to imagine more compelling use of the Privacy Act than obtaining text disclosing a reported accuser's identity and allegation, particularly when the accused is (albeit ambiguously) alleged to have confessed to said allegation but retains irrefutable evidence he was not even present – let alone party to – the confession.

Petitioner's forced resignation implicates decisionality under the Peace Corps Manual ... while his forced resignation and abandonment to apparent blackmail implicate decisionality and public interest under FOIA. And the initial placement of his ASR in an agency vault subjects the document to the Privacy Act.

Yet the Court of Appeals does all in its power to deny petitioner accusatory text under either Act. It resurrects the rejected *Ray* standard, conflates FOIA exemptions, arbitrarily denies segregability, relieves the Government of its burdens, and, in the absence of supporting evidence, presumes material dichotomy between an electronic file and its prompt printout. In short, it fails to presume disclosure as required.

For these and all other foregoing reasons, the instant petition should be granted to review the appellate judgment.

Respectfully submitted,

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January 16, 2006 *Pro Se*

Supreme Court, U.S.
FILED

No. 05-94

OFFICE OF THE CLERK

In the
Supreme Court of the United States

MICHAEL G. HOROWITZ, Ph.D.,
Petitioner,

v.

PEACE CORPS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX TO PETITION

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January 16, 2006 *Petitioner Pro Se*

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NOTE

To conform to booklet format, documents reproduced in Apps. B-E have been optically copied and reformatted; reasonable care has been applied to proofreading. Photocopies of documents contained in Apps. B-D can be found in petitioner's appellate Appendix (04-5065 6/2/05 104-23, 147-60, 136-146), while a photocopy of the document contained in App. E can be found in his appellate Addendum to Reply Br. (6/20/05).

GLOSSARY

KEY PLAYERS IN THE DISPUTE BETWEEN THE PARTIES
(Occupational titles and roles as of March 16, 1999)

NUKU'ALOFA, KINGDOM OF TONGA

Lopeti V. Foliaki, J.D.	Partner, Stevenson Nelson Mitchell Foliaki, Horowitz' Counsel
Arturo Giron	Country Director, Peace Corps' Tonga Post
Michael G. Horowitz, Ph.D.	Peace Corps Volunteer, Tonga Post
Esther Sally Olsonoski	Associate Director/Education, Tonga Post[1]

ABBREVIATIONS

APCD	Peace Corps Associate Country Director
ASR	Administrative Separation Report
MS	Manual Section
PCV	Peace Corps Volunteer
RPCV	Returned Peace Corps Volunteer
Tr.	Transcript of Evidentiary Hearing re Exemption 5, Civ. No. 00-848
UNV	Peace Corps' United Nations Volunteer program
V/T	Peace Corps Volunteer or Trainee
VS/SS	Peace Corps' Office of Volunteer Services/Special Services

[1] Olsonoski assumed the position of acting country director by March 17. (04-5065 6/2/05 App. 35 at ¶¶19-20; 10/15 Tr. 72:24-73:9).

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 9, 2005 Decided October 28, 2005

No. 04-5065

MICHAEL G. HOROWITZ, PH.D,
APPELLANT/CROSS-APPELLEE

v.

PEACE CORPS,
APPELLEE/CROSS-APPELLANT

Consolidated with
04-5087 and 04-5279

Appeals from the United States District Court
for the District of Columbia
(No. 00cv00848)

Michael G. Horowitz, appearing pro se, argued the cause and filed the briefs for appellant/cross-appellee.

Lisa S. Goldfluss, Assistant U.S. Attorney, argued the cause for appellee/cross-appellant. With her on the brief were *Kenneth L. Wainstein*, U.S. Attorney, and *Michael J. Ryan*, Assistant U.S. Attorney. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Before: EDWARDS, TATEL and BROWN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: After choosing to resign from his position as a Peace Corps volunteer and thereby avoid the filing of an Administrative Separation Report (ASR) detailing allegations of sexual misconduct, pro se appellant Dr. Michael Horowitz challenges the district court's order allowing the Peace Corps to withhold the draft ASR from release under Exemption 5 of the Freedom of Information Act (FOIA). Horowitz also appeals the district court's denial of his request for access to the same document under the Privacy Act. Finally, the Peace Corps appeals the denial of its attempt to protect the name of the complainant under FOIA Exemption 6.

We conclude the district court properly exempted the draft document from release under FOIA Exemption 5 and properly found the document was not part of a system of records subject to disclosure under the Privacy Act. However, we conclude FOIA Exemption 6 also applies; therefore, the name of the alleged victim is not subject to release as a segregable fact.

I

From 1998 to 2001, Arturo Giron was Peace Corps Country Director for the Kingdom of Tonga; his duties included supervision of Peace Corps volunteers stationed in Tonga. On March 7, 1999, a female volunteer told Giron a young Tongan man claimed he had been the victim of sexual misconduct involving Michael Horowitz. The young man, a student at 'Atenisi High School, was 18 or 19 years old and appeared to have been under 18 at the time of the incident.

Giron consulted the Peace Corps Manual and contacted the General Counsel's office for advice. He also interviewed the Tongan student, who repeated substantially the same allegations. Giron and Sally Olsonoski, another Peace Corps worker, then met with Horowitz. Horowitz remembered the incident but explained that the encounter was consensual and assured Giron the student had been 18 years old at the time. Olsonoski testified that Horowitz said, "I always card them," but acknowledged that it was difficult to do so in a foreign country. Giron again sought assistance from the General Counsel's office, stating in an e-mail that "[t]here is no clear age of majority [in Tonga], but homosexual acts are illegal under the law here." Giron confessed he was "now completely confused about how to proceed," and requested guidance.

Within a week of receiving the volunteer's report, Giron prepared "a single, cohesive document" that summarized his investigations and notes from various meetings, and generally outlined the events and the actions he had taken. He used the computer template designed for creating ASRs but completed only three of the template's five sections. At that point, according to Giron, "no final decision had been made with respect to the incident and the volunteer involved. We were still in the process of deliberating."

On March 16, 1999, Giron e-mailed the document to senior officials at Peace Corps headquarters, asking them to review the draft and submit changes and comments. Later that day, Horowitz informed Giron that he was resigning from the Peace Corps. Horowitz now claims he resigned only after Giron read parts of the draft ASR to him, told him a final decision to administratively separate him had been made, and informed him that the ASR would be sent to headquarters unless Horowitz resigned. Giron denies ever making a final decision or informing

Horowitz that he had done so. At Horowitz's request, however, Giron kept the draft ASR in his office safe.

On June 18, 1999, Horowitz requested a copy of the draft ASR through FOIA, 5 U.S.C. § 552. The Peace Corps denied his request on August 17, 1999. On November 15, 1999, Horowitz administratively appealed the denial, but the Peace Corps again denied his request on April 19, 2000. Horowitz then filed suit in the United States District Court for the District of Columbia, seeking disclosure of the draft ASR under FOIA and the Privacy Act, 5 U.S.C. § 552a. The Peace Corps contended the draft ASR was a predecisional document exempt from release under FOIA and that releasing the student's name would be a clearly unwarranted invasion of his privacy. The Peace Corps also argued the document was not contained in a system of records and thus was not subject to release under the Privacy Act.

The district court granted partial summary judgment to the Peace Corps, ruling that the document was not subject to release under the Privacy Act, and partial summary judgment to Horowitz, ruling that release of the student's name would not be a clearly unwarranted invasion of privacy under FOIA. After an evidentiary hearing, the district court ruled in favor of the Peace Corps, allowing the document to be withheld as predecisional. However, the court confirmed that the identity of the student was a segregable fact that must be released to Horowitz; release of the name was stayed pending this appeal.

II

We review orders granting summary judgment *de novo*. *Computer Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 902 (D.C. Cir. 1996). We will not set aside the district court's findings of fact unless they are clearly erroneous, giving due regard to the district court's opportunity to judge the

credibility of witnesses. Fed. R. Civ. P. 52(a); *see Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1407 (D.C. Cir. 1988).

A

FOIA provides that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). The statute also provides a list of exemptions from this command. 5 U.S.C. § 552(b). "[T]he burden is on the agency to sustain its action" in claiming these exemptions. 5 U.S.C. § 552(a)(4)(B). Exemption 5 allows agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption privileges "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

The privilege is meant to protect "predecisional communications" from disclosure so as to "prevent injury to the quality of agency decisions." *Id.* at 151. Thus, the exemption "protects materials that are both predecisional and deliberative." *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). We previously have stated that "the key question in Exemption 5 cases [is] whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Dudman Commc'ns Corp. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987). "Finally, even if the document is predecisional at the time it is prepared, it can lose that status if

it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

Whether the draft ASR properly qualified as a deliberative document was the subject of an evidentiary hearing. The evidence before the court included section 284 of the Peace Corps Manual, which outlines the required process for early termination of service of Peace Corps volunteers; the depositions of Giron and Horowitz; and the testimony of Giron, Horowitz, and Sally Olsonoski at the evidentiary hearing. The manual authorizes administrative separation for conduct ranging from minor infractions like failing to wear a motorcycle helmet, to criminal convictions, to espionage. Under these provisions, the volunteer is entitled to be informed of the specific conduct at issue, have an opportunity to respond, and be apprised of the alternative of resignation. The disciplinary options range from taking no action, to imposing conditions on further service, to administrative separation. If a volunteer resigns before a final decision to terminate him is made, the ASR is not completed. If the volunteer resigns "after the decision to administratively separate has been made but before the process is completed, the Administrative Separation Report must be completed and forwarded" to the Peace Corps's Office of Volunteer Services.

During the evidentiary hearing, Giron and Olsonoski testified that no final decision was ever made to administratively separate Horowitz. Giron testified it was "the first time [he] had encountered [so serious] an incident," and it was his first experience with an administrative separation. He sought further guidance from senior staff in Tonga and consulted on a daily basis with Peace Corps headquarters, the Office of the General Counsel, and regional senior staff. He spent "literally hours and hours on the telephone with Washington, D.C., talking to the

[G]eneral [C]ounsel." On March 16, 1999, prior to the meeting where Horowitz announced his intention to resign, Giron e-mailed the draft document to headquarters with a cover e-mail that asked the recipients to "review and send comments/changes to Sally [Olsonoski]." Giron asked that comments be sent to Olsonoski because he had to leave Tonga to attend a funeral and he anticipated that she would need to make the final decision in his absence. Giron testified that he had reached no final decision prior to the time Horowitz announced his intention to resign, and that he was unwilling to make a unilateral decision:

> [W]hatever final disposition was going to be reached on this case was going to be a consensus among all the senior officials involved, myself included, but also the [O]ffice of the [G]eneral [C]ounsel and the senior staff of the region, and we had not at that point come to any particular consensus as to which course of action we were going to follow.

According to Giron's testimony, at no time did Giron tell Horowitz that he had made a decision to administratively separate him or that he was on the verge of doing so.

Giron explained that, complying with the provisions of section 284, he never completed or officially filed the draft ASR he was crafting. He believed "the opportunity to 'think aloud' in such a draft document" was "an essential part" of the section 284 decision-making process; in his opinion, making such documents publicly available would deter Country Directors from creating them and deprive such officials of the benefit of review and comment from other departments. Horowitz argues, however, that the document lost its predecisional status by being adopted as the official agency position regarding his administrative separation; in essence, he contends that Giron had already decided to terminate his service before he resigned, even though the decision was not formally executed. After evaluating the

APPENDIX

witnesses' testimony and credibility, the district court concluded Giron had not made a final decision about separating Horowitz. The document was prepared as an aid for Giron's decision-making process and for consultation with other Peace Corps officials. Hence, the document qualified as deliberative and predecisional.

We are not persuaded the district court's findings on these points are clearly erroneous. The draft is remarkably candid. Moreover, Giron's thought processes are woven into the document to such an extent that any attempt to segregate non-deliberative portions would effectively disclose the content and context of intra-agency deliberations. Accordingly, as the document did not lose its predecisional and deliberative status, it was properly withheld under FOIA Exemption 5.

B

In providing exemptions from the general requirement of disclosure, FOIA also provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Thus, the district court correctly concluded the student's name, which could be segregated, was not protected from disclosure by Exemption 5. That conclusion does not fully resolve the question of whether the student's name is nevertheless exempt from disclosure.

C

FOIA Exemption 6 allows agencies to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Horowitz agrees that the ASR qualifies as

a "similar file" as described in Exemption 6; thus, the remaining question is whether the release of the ASR—specifically, the portions identifying the student—would be a clearly unwarranted invasion of the student's privacy. In the district court, the Peace Corps argued Exemption 6 should apply; however, as counsel for the Peace Corps acknowledged during oral argument, the Corps's desire to be discreet and shield the privacy interests of all parties may have led the district court to underestimate the private interest and overstate the public benefit at issue. Horowitz's lack of reticence has allowed the Peace Corps to correct this defect on appeal.

To determine whether release of a file would result in a clearly unwarranted invasion of personal privacy, we must balance the private interest involved (namely, "the individual's right of privacy") against the public interest (namely, "the basic purpose of the Freedom of Information Act," which is "to open agency action to the light of public scrutiny"). *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372-73 (1976) (internal quotation marks omitted).

The focus of the public interest analysis is the citizens' right to know "'what their government is up to.'" *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citations omitted); *see also Beck v. Dep't of Justice*, 997 F.2d 1489, 1491 (D.C. Cir. 1993) (stating that the standard from *Reporters Committee* "is applicable in the case of Exemption 6"). Neither "the identity of the requesting party" nor "the particular purpose for which the document is being requested" is relevant, *Reporters Comm.*, 489 U.S. at 771-72, because "[a]s a general rule, if the information is subject to disclosure, it belongs to all." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Hence, release under FOIA is equivalent to making the information publicly available.

The availability of information through other sources lessens the public interest in its release through FOIA. *See U.S. Dep't of Def., Dep't of Military Affairs v. Fed. Labor Relations Auth.*, 964 F.2d 26, 29 (D.C. Cir. 1992). If there is no public interest in the disclosure of certain information, "something, even a modest privacy interest, outweighs nothing every time." *Nat'l Ass'n. of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989). "We generally accord Government records and official conduct a presumption of legitimacy." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991). Furthermore, "clear evidence is usually required to displace" the presumption and show the presence of a public interest in investigating an agency. *Favish*, 541 U.S. at 174.

The public interest in this case is virtually nonexistent. Horowitz alleges the Peace Corps mistreated him, and that revealing the student's name will allow investigation of the agency's actions. However, he offered no credible evidence of misconduct by the Peace Corps; the district court found Giron's testimony "forthright" and Horowitz's testimony "continually evasive." Horowitz's real complaint is that he had to choose between two unpalatable alternatives. It is difficult to see how the Peace Corps's long-established procedure of allowing volunteers to resign rather than face public charges of misconduct could be deemed improper. Horowitz simply alleges that in order to prove the Peace Corps's perfidy, "it may be necessary to confirm the relation of Complainant, if any, to the Kingdom of Tonga's political, military, and/or criminal factions." Appellant's Reply Br. at 44. Horowitz offers no further details to support these extremely speculative allegations; he has not offered the "clear evidence" required to overcome the presumption that the Peace Corps's official conduct was proper.[1] In no

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[1] Horowitz's unsupported allegation that the Peace Corps is protecting the student's name in order to cover up for its failure to

way would release of the student's name serve the civic good. Additionally, Horowitz's need to obtain the information for a pending civil suit is irrelevant, as the public interest to be weighed has nothing to do with Horowitz's personal situation.

The privacy interest implicated in a case such as this is the individual's right to "avoid[] disclosure of personal matters." *Reporters Comm.*, 489 U.S. at 762 (internal quotation marks and citation omitted).[2] Under Exemption 6, "the fact that an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of the information," *id.* at 770 (internal quotation marks and citation omitted), as "there are few facts that are not at one time or another divulged to another," *id.* at 763.

Even seemingly innocuous information can be enough to trigger the protections of Exemption 6. In *United States Department of Defense v. Federal Labor Relations Authority*, the Supreme Court held Exemption 6 shielded the names and home addresses of agency employees from being released to unions that requested the lists under FOIA. 510 U.S. 487, 502 (1994). Because "[m]any people simply do not want to be disturbed at home by work-related matters," the Court was "reluctant to disparage the privacy of the home, which is accorded special

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protect Horowitz from the student's purported blackmail attempt similarly fails to defeat the presumption of official regularity.

[2] In *Reporters Committee*, the Court examined FOIA Exemption 7(C), applicable to law enforcement files, rather than Exemption 6. Nevertheless, the Court has held that the difference between the standards for the two exemptions "is of little import" except when analyzing "the magnitude of the public interest that is required to override the respective privacy interests protected by the exemptions." *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496 n.6 (1994).

consideration in our Constitution, laws, and traditions." *Id.* at 501. Additionally, "other parties, such as commercial advertisers and solicitors, must have the same access under FOIA as the unions"; releasing the lists to the unions would have necessitated giving other parties access as well. *Id.* Thus, the Court found that the privacy interests outweighed the "negligible" public interest at stake. *Id.* at 502.

The scope of privacy protection under FOIA is not the same as in the constitutional context, *Reporters Comm.*, 489 U.S. at 762 n.13, although being "accorded special consideration in our Constitution, laws, and traditions" can give additional weight to a privacy interest. *U.S. Dep't of Def.*, 510 U.S. at 501. Hence, even if the incident between Horowitz and the student was consensual, the student might have a privacy interest in avoiding disclosure of his identity. *See generally Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (stating that sexual behavior is "the most private human conduct").

Victims of sexual assaults have an arguably greater interest in the protection of their privacy. For example, the Sixth Circuit has reasoned that the occurrence of a rape "implicates both a private and a public interest, but the details of the rape primarily implicate a private interest until such time as the public interest in prosecution predominates." *Bloch v. Ribar*, 156 F.3d 673, 685-86 (6th Cir. 1998). The private interest in nondisclosure may predominate in such a case because of the personal trauma involved and the moral and social opprobrium disclosure often presages. The "interest in protecting the victims of sexual violence from humiliation, among other injuries, has prompted states to pass rape shield laws and to advocate against the publication of rape victims' names." *Id.* at 685. Similarly, Federal Rule of Evidence 412 limits the admissibility of evidence regarding the past sexual behavior or predispositions of an alleged victim of a sexual offense. "The rule aims to

safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process." Fed. R. Evid. 412 advisory committee's note.

In *Hunt v. FBI*, the Ninth Circuit held that the FBI should not release files from its internal investigation of an agent who had been accused of sexual misconduct; even if the agent's name was redacted from the files, she would have been identifiable based on other information in the files. 972 F.2d 286 (9th Cir. 1992). Although *Hunt* involved Exemption 7(C), under which only a reasonable expectation of an invasion of privacy must be shown to prevent releasing information, the court's reasoning is still relevant. That court found identification of the agent could have caused her "great personal and professional embarrassment," while not serving a significant public interest, as "[t]he single file sought . . . will not shed any light on whether all such FBI investigations are comprehensive or whether sexual misconduct by agents is common." *Id.* at 288-89.

While we do not confront the constitutional question that was before the Sixth Circuit in *Bloch*, the reasoning of the court aptly describes the contours of the public/private balance at stake here. We are persuaded that the student's interest in avoiding disclosure of his name is at least as strong as the privacy interest of a government agent accused of sexual misconduct, and that it is certainly as strong as the interest of federal employees in avoiding disclosure of their names and addresses. If released, the student's name would be associated not merely with an employer, or even personal sexual misconduct, but with a disputed sexual incident that he claims was not consensual. Even though the student did reveal his allegation to two Peace Corps workers, and did not receive an explicit promise of confidentiality, he still has an interest in avoiding

further dissemination of his identity. Our law uniformly recognizes that strong privacy interests are implicated when dealing with an individual's sexual activity, especially when the individual has reported a sexual assault. Unwanted public attention could lead to further trauma for the victim, who in this case did not even choose to subject himself to public scrutiny by pursuing criminal charges. His choice of virtual anonymity would be undermined by releasing his identity under FOIA, as releasing it to one person is equivalent to authorizing its release to anyone.

Accordingly, with a strong privacy interest in non-disclosure being weighed against a *de minimis* public interest in the disclosure, the invasion of privacy resulting from the release of the student's name would be "clearly unwarranted." The Peace Corps may therefore withhold the student's name under Exemption 6.

III

We turn now to the Privacy Act, which requires any "agency that maintains a system of records" to allow a requesting individual to review and make a copy of "his record or . . . any information pertaining to him which is contained in the system." 5 U.S.C. § 552a(d)(1). The agency must show the absence of a genuine issue of any material fact in order to be granted summary judgment. Fed. R. Civ. P. 56(c). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The district court held that Horowitz was not entitled to the document under the Privacy Act because the document is neither maintained, nor required to be main-

tained, in a "system of records." This ruling is unassailable. The Peace Corps's regulations dictate that an ASR should not be maintained in the agency's records if a volunteer resigns prior to an official decision to administratively separate him. In fact, the Peace Corps's manual states that an ASR should not even be completed if a volunteer resigns before such a decision is made. Since Horowitz resigned before any final decision was made, the report was never completed and—pursuant to the procedure specified by the manual—was not maintained in the Peace Corps's official files.

Nor has Horowitz shown that Giron nevertheless placed the draft ASR in a "system of records." The Act defines "system of records" to mean "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). We have held that the words "is retrieved" "suggest strongly that a group of records should generally not be considered a system of records unless there is actual retrieval of records keyed to individuals." *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1460 (D.C. Cir. 1996). In the district court, the Peace Corps presented affidavits from two of its officials stating that they had searched the Peace Corps's records and had found no ASR regarding Horowitz. Horowitz presented no evidence to counter this assertion. He alleges a copy of the draft ASR was stored in Giron's safe for some period of time, a contention the Peace Corps does not deny, and also claims the draft ASR was retrieved by his name at least one time. That "retrieval," however, occurred when Giron e-mailed the draft ASR to headquarters, and thus involved an electronic copy, not the physical document in the safe. Horowitz has not shown that files in the safe are, in practice, retrieved by individuals' names; hence, he has not "establish[ed] the existence of an element essential to his case," namely, whether the safe qualifies as a

system of records. The district court properly granted summary judgment to the Peace Corps on the ground that the document is not subject to release under the Privacy Act.[3]

Finally, we note that because the document is predecisional, it can attest to nothing. It has no official existence and continues to be held only because of pending litigation. In fact, the Peace Corps indicated at oral argument that the document will be destroyed once it is no longer needed in relation to Horowitz's various civil suits.

IV

Horowitz raises several other points on appeal. First, he claims that the district court abused its discretion in choosing to review a copy of the draft ASR in camera after conducting the evidentiary hearing. A court "may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions" which apply to FOIA. 5 U.S.C. § 552(a)(4)(B). The decision of whether to conduct an in camera review of a document is within the trial court's "broad discretion" and is reviewed only for abuse of discretion. *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998). Horowitz claims reviewing a document containing such disturbing allegations necessarily prejudiced the district court judge against him. However, he points to no credible evidence relating to this claim or to any abuse of discretion in reviewing the document. Indeed, the district court refused the Peace Corps's request to view the document at an

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[3] The status of the copy of the draft ASR that Giron e-mailed to headquarters is not before us. Horowitz has not argued that the Peace Corps's e-mail system qualifies as a "system of records" under the Privacy Act. Our ruling is confined solely to the copy of the ASR that was stored in Giron's safe.

earlier point in the proceeding, choosing instead to wait until after the evidentiary hearing to do so. Horowitz's claim on this point is without merit.

Additionally, Horowitz now claims the Fifth and Sixth Amendments, as well as the Administrative Procedure Act, entitle him to know the allegations contained in the draft ASR. "It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984). At the same time, "[t]here may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Horowitz presents no compelling reason why he was not able to present these issues in the district court; therefore, he may not assert these claims on appeal.

Finally, Horowitz claims the district court abused its discretion in two ways: by denying his motion to present more evidence after the court's ruling was entered, and by adopting the Peace Corps's findings of fact. "[U]pon such terms as are just," Federal Rule of Civil Procedure 60(b) allows a party to be relieved from a final judgment due to, among other reasons, mistake, surprise, or misconduct of an adverse party. We review the denial of a Rule 60(b) motion for abuse of discretion unless the decision was rooted in an error of law. *Andrx Pharm. Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 805 (D.C. Cir. 2001). Horowitz points to no misconduct on the part of Peace Corps's counsel, nor does he explain why any surprise was unjust rather than a result of a mistake by his attorney. Similarly, Horowitz's examples of "clear error" in the findings adopted by the court are either immaterial or based on evidence that the court found

to be more credible than the evidence Horowitz presented. Hence, Horowitz has not shown that the district court abused its discretion in either instance.

V

For the above reasons, we hold that the Peace Corps may withhold the student's identity from release under FOIA Exemption 6. In all other respects, we affirm the judgments of the district court.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL G. HOROWITZ, Ph.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	**Civ. No. 00-0848 (TFH)**	
	)	
PEACE CORPS,	)	
	)	
Defendant.	)	

FILED
OCT 12 2001
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

Pending before the Court are cross-motions for summary judgment by the plaintiff, Michael Horowitz, Ph.D., and the defendant, the U.S. Peace Corps. Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, Horowitz seeks the release of one document in the possession of the Peace Corps involving his March 1999 resignation from service with the defendant. The Peace Corps has refused to release the document, invoking two exemptions of the FOIA and arguing the inapplicability of the Privacy Act. Upon careful consideration of both motions, the statements of material facts, the oppositions and replies thereto, and the entire record herein, the Court will grant in part and deny in part both motions.

I. BACKGROUND

Until 1999, Horowitz was a Peace Corps volunteer in the Kingdom of Tonga, assigned to a Tongan educational institution as an educator. Pl.'s Statement of Facts ¶ 1; Def's Corrected Statement of Facts ¶ 1. On March 7, 1999, the Peace Corps

Country Director in Tonga, Arturo Giron, learned of allegations made by a third party of personal conduct on the part or Horowitz that in Giron's view constituted inappropriate behavior for an American Peace Corps Volunteer in Tonga, serving as an educator of Tongan youth. Def. 's Corrected Statement of Facts ¶ 2; Pl.'s Statement of Facts ¶ 4, Pl.'s Disputed Facts ¶ 1. Over the next few days, Giron conferred with numerous officials in Peace Corps headquarters, including attorneys in the Office of General Counsel, the Director of the Office of Special Services, and representatives from the Inter-American & Pacific Region, deliberating about the appropriate action to take in response to the allegations. Def.'s Corrected Statement of Facts ¶ 3.

The information Giron learned concerned him. His professional opinion was that, within Tongan society, Horowitz as an American schoolteacher occupied a position of prestige, trust, and authority, and his alleged behavior appeared to have abused that position. Moreover, Giron claims that a senior member of his staff informed him that, if true, Horowitz's behavior was illegal and extremely offensive under the laws and cultural mores of Tonga. Def.'s Corrected Statement of Facts ¶ 5. Giron therefore decided to initiate an internal administrative process for formally reviewing and adjudicating allegations of conduct by Peace Corp volunteers that could result in disciplinary action, including administrative separation from the Peace Corps volunteer service. That process is governed by Peace Corps Manual Section 284 ("MS 284"). Def.'s Corrected Statement of Facts ¶ 6.

On March 12, 1999, Giron and Horowitz met. As required by MS 284, Giron advised Horowitz that he was initiating a MS 284 process based on the allegations, explained the administrative process, and informed Horowitz that he might decide to administratively separate him, which Horowitz would be entitled to appeal. Id. ¶ 7.

For several days after the meeting, Giron continued to gather facts and seek guidance from Peace Corps headquarters. Id.

¶ 8. Having been advised by Peace Corps attorneys to prepare a draft of an administrative separation report ("ASR") and send it to the attorneys and other agency officials, Giron prepared the document sometime in mid-March 1999. Id. ¶¶ 11-12.

On March 16, 1999, Giron and the Associate Peace Corps Director in Tonga, Sally Olsonoski, met with Horowitz. They discussed the allegations that had led to the MS 284 process and the possibility of Horowitz's termination. Giron also discussed some of the document's content with Horowitz. Pl.'s Statement of Facts ¶¶ 4-5; Def.'s Corrected Statement of Facts ¶ 17-18. At the end of the March 16, 1999 meeting, Horowitz expressed his intent to resign. Def.'s Corrected Statement of Facts ¶ 19. On March 17, 1999, Horowitz submitted his signed resignation from service with the Peace Corps. Id.; Pl.'s Statement of Facts ¶ 6.

By letter dated June 18, 1999, Horowitz sent a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, request to the Peace Corps for "the partially-completed or completed Administrative Separation Report regarding Dr. Horowitz, apparently written by the Country Director of your Tongan post, Mr. Arturo Giron, sometime between the 10th and 18th of March 1999." Second Am. Compl. Attach. A; Pl.'s Statement of Facts ¶ 3; Def.'s Corrected Statement of Facts ¶ 24. The Peace Corps denied the request on August 17, 1999. Pl.'s Statement of Facts ¶ 7; Def.'s Corrected Statement of Facts ¶ 25. Horowitz administratively appealed the denial on November 15, 1999, which was denied on April 19, 2000. Pl.'s Statement of Facts ¶¶ 8-9; Def.'s Corrected Statement of Facts ¶ 26-27.

Horowitz then filed the instant lawsuit seeking disclosure of the document drafted by Giron in mid-March 1999, pursuant to FOIA, 5 U.S.C. § 552(a)(3)(A), and the Privacy Act, 5 U.S.C. § 552a(d)(1). The Peace Corps refuses to disclose the document, claiming that it is exempt from FOIA disclosure under both the deliberative process privilege of Exemption 5, 5 U.S.C. § 552(b)(5), and the personal privacy exclusion of Exemption 6, 5

U.S.C. § 552(b)(6). The Peace Corps also contends that Horowitz's Privacy Act claim fails because the document is neither maintained nor required to be maintained in a system of records, 5 U.S.C. § 552a(a)(5). Both parties have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56.

II. DISCUSSION

A. Legal Standard

Summary judgment is the usual means for disposing FOIA and Privacy Act cases, but the Court will grant summary judgment only if the moving party proves that no substantial and material facts are in dispute and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Founding Church of Scientology v. NSA, 610 F.2d 824, 836 (D.C. Cir. 1979); McGehee v. CIA, 679 F.2d 1095, 1101-02 (D.C. Cir. 1983).

B. FOIA

The FOIA imposes a general rule of disclosure upon request by the public of records generated by federal agencies. 5 U.S.C. § 552(a)(2); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136-37 (1975) (citing EPA v. Mink, 410 U.S. 73.79-80 (1973)); Rockwell Int'l Corp. v. U.S. Dep't of Justice, 235 F.3d 598,602 (D.C. Cir. 2001). However, an agency may withhold information that falls within one of FOIA's nine exemptions. 5 U.S.C. § 552(b); Sears, Roebuck & Co., 421 U.S. at 136-37. The Court will determine de novo the question of ordering or enjoining a government agency's production of documents, and the agency bears the burden of justifying its withholding. 5 U.S.C. § 552(a)(4)(B); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989). In this case, the Peace Corps has invoked Exemptions 5 and 6 to justify its withholding the document sought by Horowitz.

1. Exemption 5

Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Supreme Court has construed this language "to exempt those documents, and only those documents, normally privileged in the civil discovery context." Sears, Roebuck & Co., 421 U.S. at 149; see also Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987). One privilege incorporated into Exemption 5, and relied upon by the Peace Corps here, is the deliberative process, or executive, privilege, which serves "to prevent injury to the quality of agency decisions." Sears, Roebuck & Co., 421 U.S. at 149-52; see also, e.g., Russell v. Dep't of the Air Force, 682 F.2d 1045, 1047-48 (D.C. Cir. 1982); Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 858 & n.2, 866-69 (D.C. Cir. 1980). Three policy bases underlie this privilege:

> First, it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided(,) not for matters they considered before making up their minds."

Jordan v. Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978), quoted in Russell, 682 F.2d at 1048. In other words, the privilege "'protect[s] the decisionmaking processes of government agencies' and 'encourage[s] the frank discussion of legal and policy issues' by ensuring that agencies are not 'forced to operate in a fishbowl.'" Wolfe v. HHS, 839 F.2d 768, 773 (D.C. Cir. 1988) (en banc), quoted in Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C.

Cir. 1993). Consistent with the FOIA's strong policy of disclosure, however, "Exemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'" Petroleum Info. Corp., 976 F.2d at 1434 (quoting Mink, 410 U.S. at 87).

To qualify under this privilege, a document must be both "predecisional" and "deliberative." Mapother, 3 F.3d at 1537 (citing Petroleum Info. Corp. v. Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992)); Coastal States, 617 F.2d at 866. "A document is predecisional if it was 'prepared in order to assist an agency decisionmaker in arriving at his decision,' rather than to support a decision already made." Petroleum Info. Corp., 976 F.2d at 1434 (quoting Renegotiation Bd. v. Grumman Aircraft, 421 U.S. 168, 184 (1975)). And the "[m]aterial is deliberative if it 'reflects the give-and-take of the consultative process.' " Id. (quoting Coastal States, 617 F.2d at 866)). As explained by the Court of Appeals for this Circuit some time ago:

> In deciding whether a document should be protected by the privilege we look to whether the document is "predecisional" – whether it was generated before the adoption of an agency policy – and whether the document is "deliberative" – whether it reflects the give-and-take of the consultative process. The exemption thus covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency. Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position. To test whether disclosure of a document is likely to adversely affect the purposes of the privilege, courts ask themselves whether the document is so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency; ... We also ask whether the document is recommendatory in nature or is a draft of

> what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another. Finally, even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.

Coastal States, 617 F.2d at 866.

The Peace Corps argues that the document at issue here is both predecisional and deliberative. In its view, the document is predecisional because it never made a decision respecting Horowitz's administrative separation from service with the Peace Corps. Horowitz's resignation terminated the administrative process for considering Horowitz's separation before it was completed, thereby rendering a final decision unnecessary. For support, the Peace Corps has proffered a declaration from Giron, stating that he had made no decision respecting Horowitz's administrative separation:

> Although the draft report reflects my preliminary thinking about these issues, I never made any final conclusions of fact in connection with the allegations against Plaintiff, and I never determined what, if any, disciplinary action was warranted. Before making a final decision on these matters, I would have waited for Peace Corps headquarters officials to complete their review and evaluation of the draft document and to forward their recommendations to me. Counsel from Peace Corps headquarters officials would have significantly influenced my fact finding, analysis, final decision, and the content and form of any final report explaining my final decision.

Def.'s Mot. Ex. 1 (Decl. of Arturo Giron) ¶¶ 22-23; see also id. ¶¶ 7-24. Giron also states that at the March 16, 1999 meeting, "I told [Horowitz] that I had not yet made a final decision whether to

administratively separate him or take any other action. . . . I did not tell him that I would separate him if he did not resign. I did not give him a copy of the draft document I had e-mailed to Washington, or any portion of it." Id. ¶ 18. The Peace Corps further contends that the document is deliberative because it is merely a first draft of an ASR, created by Giron to serve as a working document for further intra-agency discussion, contemplation, and revision. As Giron states,

> Although I had not yet made any decision as to my recommendations regarding this matter, Peace Corps attorneys asked me to prepare a first draft of an administrative separation report and send it to them and other agency officials with whom I was working on this matter. I prepared such a draft report, which I understood would serve as a working document for further discussion. The draft document reflects a snapshot of my then-current thinking about one possible decision I could make concerning this matter, at a point in time when I was in the midst of on-going deliberations with Peace Corps lawyers and other Peace Corps headquarters officials concerning the entire situation and an appropriate agency response. The draft document constituted my first attempt to sift through the evidence and determine what facts might be relevant and appropriate to include in a report, and my first attempt to articulate why those facts might support an administrative separation.

Id. ¶¶ 12-13.

Horowitz counters that the document created by Giron is neither predecisional nor deliberative because as a matter of practical reality, the decision to terminate him was made before he resigned and that decision is embodied in the document he now seeks. He offers two declarations of his own to support his claim that Giron had made a decision to administratively separate him prior to his resignation:

> I attended a final meeting on March 16, 1999 with the Country Director. He informed me at that time that he had finally and unequivocally decided to administratively separate me. He showed me the Administrative Separation Report that had been prepared and read telling portions of it to me. He warned me that the report would be lodged with headquarters within eighteen hours, at which time it would become accessible to all United States agencies. . . . At no time did the Country Director give any indication that the Post's decision to separate me or the Administrative Separation Report justifying that decision was provisional or subject to any further review within the Peace Corps. At all times, he represented both the Post's decision and the Report as the final judgment regarding my continued service.

Pl.'s Mot. Ex. A (Decl. of Michael G. Horowitz) ¶¶ 11-12; Pl.'s Opp'n Ex. F (Second Decl. of Michael G. Horowitz) ¶ 11 ("Mr. Giron left absolutely no doubt during our final meeting on March 16th that he had reached a final decision to separate me from Peace Corps service. In fact, I recall he began that meeting by saying, 'Michael, I've decided to administratively separate you.'"). The plaintiff additionally offers a declaration from his lawyer in Tonga, Lopeti Vitolio Foliaki, who states that he met with Giron alone on March 15, 1999, at which time he "asked Mr. Giron if Dr. Horowitz would be administratively separated. Mr. Giron unequivocably [sic] confirmed that the administrative separation would occur and even indicated that Dr. Horowitz would be separated within the next day or two." Id. Ex. B (Decl. of Lopeti Vitolio Foliaki) ¶¶ 6-7. In conjunction with this evidence that Giron had made a decision to administratively separate him, Horowitz emphasizes the fact that Giron was the ultimate decision maker in this situation; he had full authority, and thus needed no other approval, to administratively separate Horowitz. Notwithstanding his resignation, therefore, Horowitz contends that

the decision to administratively separate him from service with the Peace Corps had already been made as a practical matter.

In light of this conflicting evidence of whether Giron had decided to administratively separate Horowitz at the time he drafted the document, the Court concludes that summary judgment for either party is inappropriate at this juncture. As a predicate for determining whether the document in question is predecisional, the timing of such a decision – if it was made at all – is obviously a significant material fact. And because the parties have submitted conflicting evidence on when, indeed whether, a decision was made by Giron, a genuine issue of material fact exists, precluding summary judgment on whether Exemption 5 should or should not apply. In particular, the Court is unable – without making findings of fact – to determine whether the document was "'prepared in order to assist [Giron] in arriving at his decision,' rather than to support a decision already made [by him]." Petroleum Info. Corp., 976 F.2d at 1434 (quoting Renegotiation Bd., 421 U.S. at 184). Accordingly, both motions will be denied on this issue.

*2. **Exemption 6***

Exemption 6 permits the government to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). As a threshold matter, therefore, the material in question must qualify as "personnel and medical files and similar files." Id. If the material qualifies, the inquiry turns to whether disclosure "would constitute a clearly unwarranted invasion of personal privacy," id., which requires a balancing of the public's right to disclosure against the individual's right to privacy. Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976); Lepelletier v. FDIC, 164 F.3d 37, 46 (D.C. Cir. 1999) ("[A] court must weigh the 'privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, the disclosure would work a clearly unwarranted invasion of personal privacy.' ") (quoting Nat'l

Ass'n of Retired Fed. Employees v. Homer, 879 F.2d 873, 874 (D.C. Cir. 1989)); Ripskis v. HUD, 746 F.2d 1, 3 (D.C. Cir. 1984). "The burden is on the agency to persuade the court that the exemption is appropriate." Ripskis, 746 F.2d at 3 (citing Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971)).

Horowitz does not dispute that the identity of his accuser qualifies as similar files for the purposes of Exemption 6, and the Court has no reason to conclude otherwise. The Supreme Court has given the phrase "similar files" a broad interpretation, including "all information that applies to a particular individual." Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982); accord Lepelletier, 164 F.3d at 46. The protection covers all personal information, "even if it is not embarrassing or of an intimate nature." Homer, 879 F.2d at 875. Thus, the Court has little difficulty determining that the third party identity here qualifies as a similar file for the purposes of Exemption 6.

The Court therefore must next determine whether disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). This inquiry requires an examination of whether "disclosure would compromise a substantial, as opposed to a de minimis, privacy interest. If no significant privacy interest is implicated ... FOIA demands disclosure." Homer, 879 F.2d at 874; accord Ripskis, 746 F.2d at 3 (stating that Court must determine whether "disclosure of the requested information [would] compromise substantial privacy interests; if privacy interests in given information are de minimis disclosure would not amount to a 'clearly unwarranted invasion of personal privacy,' [5 U.S.C. § 552(b)(6)], in light of FOIA's broad policy favoring disclosure"). The threats to privacy interests must be "more palpable than mere possibilities." Rose, 425 U.S. at 380 n.19. But there may be several "links in the causal chain" from disclosure to invasion of privacy if such harm is a substantial probability. Homer, 879 F.2d at 878.[1]

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[1] As the court explained:

The Court finds that the Peace Corps has made a showing, at best, of only a de minimis privacy interest. The Peace Corps argues that "the disclosure of identifying information about private third parties, and in connection with the highly private, sensitive matters they may have disclosed to the Peace Corps regarding the allegations concerning plaintiff's sexual conduct, would constitute a clearly unwarranted invasion of personal privacy while revealing little or nothing about the agency's own conduct." Def.'s Opp'n at 10. And while there may not have been a confidentiality agreement between the third-party complainant and the Peace Corps per se, the defendant contends, the Peace Corps did not represent that it would release the information to the general public. Cf. Alliance for the Wild Rockies v. Dep't of Justice, 53 F. Supp. 2d 32, 33, 36 (D.D.C. 1999) (requiring the release of the identities of individuals who submitted written comments to a proposed rulemaking regarding the reintroduction of the grizzly bear into portions of Idaho and Montana, in part because the information was submitted voluntarily and because the government "made it abundantly clear in its notice that the individuals submitting comments to its rulemaking would not have their identities concealed"). Horowitz rejoins that there is no discernable privacy interest at stake here; there was no confidentiality agreement and accordingly no expectation of privacy, and the third-party complainant voluntarily offered information to the Peace Corps. While the Court recognizes that the underlying allegations against the plaintiff involve "highly private, sensitive matters," as the defendant points out, this fact alone does not somehow demonstrate that "disclosure

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In virtually every case in which a privacy concern is implicated, someone must take steps after the initial disclosure in order to bring about the untoward effect. Disclosure does not, literally by itself, constitute a harm; it is the requester's (or another's) reaction to the disclosure that can sting. This is only more obvious where disclosure of the information invades someone's privacy not because it is embarrassing but because it invites unwanted intrusions.

Homer, 879 F.2d at 878.

would compromise a substantial, as opposed to a de minimis, privacy interest." Homer, 879 F.2d at 874. This is particularly the case where the underlying accusations that involve private and sensitive matters were made against the *plaintiff*, as opposed to the third-party complainant whose privacy interests the defendant now seeks to protect. Without a much more substantial showing, therefore, the Court can find nothing more than an implicit, yet minimal, privacy interest of the third-party complainant.[2]

The Court also finds a minimal public interest in the release of the third party's identity. "[I]n assaying the public interest, [the Court] must examine 'the nature of the requested document and its relationship to the basic purpose of [FOIA] to

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[2] This Circuit has recognized that "the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant, as several other circuits have held." Homer, 879 F.2d at 875 (collecting cases). But the Peace Corps here provides no basis for determining how disclosure in this case would compromise a substantial privacy interest. It has provided no information about potential harassment or safety concerns, for example. Cf., e.g., Hudson v. Dept of the Army, No. 86-1114, 1987 WL 46755, *2-3 (D.D.C. Jan. 29, 1987) (finding substantial privacy interest for exempting from FOIA request the name, rank, military organization, address, and Army Post Office number of active duty military personnel in Europe, the Middle East, and Africa who had registered motor vehicles, in part, because the court "would have to be blind in order to deny that the information could be used by terrorists and their supporters in targeting servicemen and women, locating sensitive units, car bombing attacks, and general harassment of United States military personnel" and because the court is "forced to consider not only the precise information requested but the possible effects such release will have on the physical safety and well-being of those affected"); Homer, 879 F.2d at 876-77 (stating that whether disclosure is a "significant or a de minimis threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue" and finding that "disclosure of the information requested here would interfere with the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes").

open agency action to the light of public scrutiny.'" Homer, 879 F.2d at 878 (quoting Reporters Comm., 489 U.S. at 771); accord Rose, 425 U.S. 372. In addition, the Supreme Court has stated that FOIA's

> basic policy ... focuses on the citizens rights' to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.

Reporters Comm., 489 U.S. at 773, quoted in Homer, 879 F.2d at 878-79; Getman, 450 F.2d at 680 (stating that FOIA "was designed in part to 'provide the means by which the people of this country can become informed and thus be able to scrutinize the activities and operation of their Government.'"); Gannett Satellite Info. Network, Inc. v. Dep't of Educ., 1990 WL 251480, at *6 (D.D.C. Dec. 21, 1990) (evaluating whether the information requested under FOIA reveals anything about government operations). The Peace Corps, needless to say, argues that there is no public interest at all in the release of the third party's identity; "[i]t would simply confirm or deny the identities of the individuals involved in the [sic] Giron's investigation into the allegations against the plaintiff." Def's Opp'n at 12. Horowitz counters that "[d]isclosure of the identity of the complainant in this case will reveal useful information about the kind of individual Defendant chose to find credible in reviewing the allegations made against Dr. Horowitz and in deciding his future as a Peace Corps volunteer and, thus, shed light on how the agency's component in Tonga conducts its oversight of volunteers." Pl.'s Mot. at 14-15. The Court concludes that the release of the identity of the plaintiff's accuser here may benefit the public by permitting an independent investigation of the defendant's treatment of the plaintiff, and therefore, may reveal something about Peace Corps operations. The Court notes, however, that any such public interest appears to be rather limited

as it pertains to events primarily involving an individual rather than the public at large, and the public's opportunity to learn what the Peace Corps "is up to," Reporters Comm., 489 U.S. at 773, thus is only a circumscribed possibility.

Having identified the relevant interests, the Court must balance the harm of disclosure against the benefit to the public. Rose, 425 U.S. at 372; Lepelletier, 164 F.3d at 46; Homer, 879 F.2d at 874; Ripskis, 746 F.2d at 3. In balancing the interests, the Court notes that the "clearly unwarranted" language of Exemption 6 "weights the scales in favor of disclosure." Ripskis, 746 F.2d at 3. Despite the fact that the public interest in disclosure is limited in this case, the Court has found only a de minimis privacy interest. Because the balance favors disclosure, the Court must conclude that disclosure would not amount to a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); Horner, 879 F.2d at 874; Ripskis, 746 F.2d at 3. Accordingly, the Court will order disclosure of the identity of the third-party complainant.

C. Privacy Act

Horowitz also seeks the release of the document drafted by Giron under the Privacy Act, 5 U.S.C. § 552a(d)(l). In pertinent part, the Privacy Act states:

> Each agency that maintains a system of records shall (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence.

Id. The Privacy Act defines "record" to mean

> any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

Id. § 552a(a)(4). And the Privacy Act defines "system of records" as "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." Id. § 552a(a)(5).

There is no real debate between the parties about the fact that the document at issue here is a "record" for purposes of the Privacy Act, as it contains information about Horowitz, including his name and his employment history, and has been maintained by the Peace Corps, at least for the purposes of this litigation. The Peace Corps, however, argues that the Privacy Act does not require the release of the document to Horowitz because it has not been maintained in a "system of records." 5 U.S.C. § 552a(d)(1), (a)(5). According to the Peace Corps, no final ASR was filed with the Peace Corps's Office of Special Services ("OSS") because under the MS 284 process, no ASR is to be completed if a Peace Corps volunteer resigns prior to any decision on administrative separation. Def.'s Mot. Ex. 4A (Peace Corps Manual, MS 284: Early Termination of Service) § 4.5.2 ("If a V/T [Volunteer/Trainee] resigns before the decision to administratively separate has been made, the Administrative Separation Report should not be completed."). The System Manager for OSS records has reviewed the OSS records for all Administrative Separation Reports for the years 1995 to the present and confirms that the record does not exist in its system of records. Def.'s Mot. at 10-11, Ex. 6 (Decl. of Mary Gutmann) ¶¶ 3-4. Nor is the document located in Horowitz's in-country volunteer file. Id. at 11, Ex. 7 (Decl. of Mary Saucier) ¶¶ 2-3.

Horowitz does not dispute the fact that the document cannot be located in the OSS system of records or in his in-country volunteer file, stating in fact in his FOIA request that "it's likely the report continues to be stored in the Country Director's safe, which sits against the north wall of his office." Def.'s Mot. Ex. 5A (6/18/99 Letter from Alan F. Neckritz to the Peace Corps). He contends, however, that the only reason the document is not in the OSS or in-country volunteer files is simply because the defendant chose not to place it there, opting instead to play a "cat-and-mouse-hide-the-record game." Pl.'s Mot. at 17. Because the record exists and is accessible under his name, Horowitz claims, he is entitled to it.

The Court will grant summary judgment for the defendant on this issue at this time. There is no genuine dispute between the parties about the fact that the document has not been filed with the OSS or placed in the plaintiff's in-country volunteer file. Despite his allegations, Horowitz has provided no evidence whatsoever that the Peace Corps is playing some devious game with the document. To the contrary, all of the evidence in the record at this time demonstrates, and the plaintiff does not contest, that the document was in fact created as part of the MS 284 process. See, e.g., Def.'s Mot. Ex. 1 (Decl. of Arturo Giron) ¶¶ 7-24. Nothing about that process requires the filing of documentation in a volunteer's in-country file, and the plaintiff has provided no argument that the Peace Corps is otherwise required to file the report drafted by Giron in that file system. Rather, it is undisputed that under the MS 284 process, depending on whether a volunteer is administratively separated or whether they resign, an ASR either must be completed and filed with OSS or must not be completed at all. See Def.'s Mot. Ex. 4A (Peace Corps Manual, MS 284: Early Termination of Service) § 4.5.2.[3] As noted above, the parties have

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[3] The Peace Corps Manual specifically requires an ASR to be filed after administrative separation, see Def.'s Mot. Ex. 4A (Peace Corps Manual, MS 284: Early Termination of Service) § 9.0, but provides that:

- If a V/T [Volunteer/Trainee] resigns before the decision to

a genuine dispute concerning whether a decision was made to administratively separate Horowitz, and the Court assumes that both sides have argued and presented evidence on this issue in good-faith candor. Until the timing of a decision to administratively separate Horowitz – if it was made at all – is resolved as a factual matter, there is no basis on which the plaintiff can claim the defendant was required to file a report with the OSS. And because it is an undisputed fact that the document has been maintained neither in the OSS system of records nor in the plaintiff's in-country volunteer file, the Court will not order the document's release under the Privacy Act at this time and will accordingly grant the defendant's motion for summary judgment on this issue.

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administratively separate has been made, the Administrative Separation Report should not be completed.

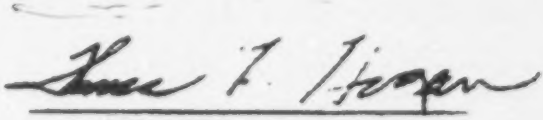
- If a V/T resigns after the decision to administratively separate has been made but before the process has been completed, the Administrative Separation Report must be completed and forwarded to VS/SS.
- If a V/T has already been administratively separated, the option of resignation is still available with the concurrence of the Deciding Official. The completed Administrative Separation Report must be forwarded to VS/SS.

Id. § 4.5.2.

III. CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part both parties' motions. Specifically, the Court will deny both parties' motions for summary judgment as they pertain to Exemption 5 of the FOIA. The Court will, however, grant the plaintiff's motion for summary judgment on the issue of Exemption 6 of the FOIA. Accordingly, the Court will order the defendant to release the third-party complainant's identity. Finally, the Court also will grant the defendant's motion for summary judgment on the plaintiff's Privacy Act claim. An appropriate order will accompany this Memorandum Opinion.

October 10, 2001



Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL G. HOROWITZ, Ph.D.,)
)
Plaintiff,)
)
v. **Civ. No. 00-0848 (TFH)**
)
PEACE CORPS,)
)
Defendant.)

FILED
OCT 12 2001
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the plaintiff's motion for summary judgment [#20] and the defendant's motion for summary judgment [#21] are **GRANTED IN PART** and **DENIED IN PART.** Specifically, it is hereby

ORDERED that both motions are **DENIED** with respect to Exemption 5 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5). It is further

ORDERED that the plaintiff's motion is **GRANTED** insofar as it relates to Exemption 6 of the FOIA, 5 U.S.C. § 552(b)(6). Accordingly, it is further

ORDERED that the Peace Corps shall release the identity of the third party complainant. It is further

ORDERED that the defendant's motion is **GRANTED** insofar as it relates to the plaintiff's Privacy Act claim, 5 U.S.C. § 552a(d)(1).

Finally, in light of the Court's decision on Exemption 5 above, it is further

ORDERED that the parties shall meet and confer and file with this Court the requisite report and proposed scheduling order under Local Rule 16.3 within 30 days of the date of this Order, specifically addressing the further proceedings necessary to resolve the parties' factual dispute respecting Exemption 5.

SO ORDERED.

October 10, 2001

Thomas F. Hogan
Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL G. HOROWITZ, Ph.D.,	)
	)
Plaintiff,	)
	)
v.	**Civ. No. 00-0848 (TFH)**
	)
PEACE CORPS,	**REDACTED VERSION**[1]
	)
Defendant.	)

FILED
JAN 06 2004
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

Pending before the Court are two matters in this Freedom of Information Act ("FOIA") case. The first is a factual dispute respecting the deliberative process privilege under Exemption 5 to FOIA, 5 U.S.C. § 552(b)(5). The second is the potential release of a stay of that portion of the Court's Order of October 12, 2001 requiring disclosure of the third party complainant's identity until final judgment on the Exemption 5 issue is entered. Upon careful consideration of both matters, each of the parties' Proposed Findings of Fact and Conclusions of Law, the draft Administrative Separation Report ("ASR") in question, the evidentiary hearing which occurred on October 10, 2002 and October 15, 2002, the exhibits submitted at that hearing, the plaintiff's consent to a limited stay of releasing the third-party complainant's identity, the Court's decisions of October 12, 2001 and February 26, 2002, and

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[1] Information contained in the non-redacted memorandum opinion was obtained from a document submitted to the Court *in camera* and under seal. Accordingly, that non-redacted opinion is available only to the Court.

the entire record herein, the Court adopts and incorporates in its entirety the Defendant's Proposed Findings of Fact and Conclusions of Law. Consequently, the Court finds that Exemption 5 of FOIA, the deliberative process privilege, allows the Peace Corps to withhold release of the ASR in question. Further, the Court will lift the stay of disclosure of the third-party complainant's identity.

I. BACKGROUND[2]

Through this lawsuit, Plaintiff Michael Horowitz seeks the release of the ASR[3] in the possession of Defendant Peace Corps involving his March 1999 resignation from service with the defendant as an educator in the Kingdom of Tonga. The Peace Corps has refused to release the document, invoking Exemptions 5 and 6 of FOIA and contending that the Privacy Act is inapplicable.

In a Memorandum Opinion and Order filed on October 12, 2001, the Court denied in part and granted in part the parties' cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56. With respect to Exemption 5 of FOIA, the deliberative process privilege, the parties submitted conflicting evidence on a significant material fact – namely, whether Arturo Giron, the Peace Corps Country Director in Tonga, had decided to administratively separate Mr. Horowitz at the time Mr. Giron drafted the ASR at issue in this case.[4] The Court accordingly denied both parties' motions on this issue and ordered the parties

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[2] In prior decisions, the Court thoroughly discussed the general background underlying the claims asserted by the plaintiff in this lawsuit, see, e.g., 10/12/01 Mem. Op. at 1-4 and 02/26/02 Mem. Op. at 2-3, and therefore need not reiterate its entirety here.

[3] In referring herein to this document as "ASR," the Court does not mean to imply that the document is anything other than a draft.

[4] The applicable legal standard related to Exemption 5 is set forth in great detail at pages 5-6 of the Court's Memorandum Opinion dated October 12, 2001, and is incorporated herein by reference.

to meet and confer and file with the Court a report and proposed scheduling order addressing the further proceedings necessary to resolve the parties' factual dispute respecting the exemption. See 10/12/01 Mem. Op. at 5-10. Upon reviewing this report, the Court set an evidentiary hearing for October 10, 2002 (which was continued on October 15, 2002) in order to address the Exemption 5 issue and to fully evaluate the credibility of the parties' witnesses.

With respect to Exemption 6 of FOIA, the personal privacy exemption, vis-a-vis Horowitz's specific request for the release of the identity of the third-party complainant whose complaint precipitated Horowitz's resignation from the Peace Corps, the Court identified and balanced the pertinent interests, and it concluded that the balance favored disclosure of the identity. The Court thus granted Horowitz's motion for summary judgment on this issue and accordingly ordered the release of the third-party complainant's identity. See id. at 10-15. Finally, the Court found release of the ASR under the Privacy Act inappropriate and accordingly granted summary judgment to the defendant on that issue. See id. at 15-18.

In a Memorandum Opinion and Order filed on October 12, 2001, the Court denied the Peace Corps's motion for leave to submit the ASR in camera and for reconsideration of the Court's October 12, 2001 Order.[4] The Court also denied the Peace Corps's motion to stay the joint report requirement, but granted its motion to stay disclosure of the third-party complainant's identity until final judgment on the Exemption 5 issue is entered.

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[4] By Order dated October 15, 2002, the Court found that at the conclusion of all of the testimony in the evidentiary hearing, it was appropriate for the Defendant to submitt the ASR to the Court for an *in camera* review. The Court has considered the ASR *in camera* as part of the overall evidentiary record of the case.

II. DISCUSSION

At an earlier stage of this case, the Court found summary judgment to be an inappropriate vehicle for disposing of the Exemption 5 issue:

> In light of [the] conflicting evidence of whether Giron had decided to administratively separate Horowitz at the time he drafted the document, the Court concludes that summary judgment for either party is inappropriate at this juncture. As a predicate for determining whether the document in question is predecisional, the timing of such a decision – if it was made at all – is obviously a significant material fact. And because the parties have submitted conflicting evidence on when, indeed whether, a decision was made by Giron, a genuine issue of material fact exists, precluding summary judgment on whether Exemption 5 should or should not apply. In particular, the Court is unable – without making findings of fact – to determine whether the document was "'prepared in order to assist [Giron] in arriving at his decision,' rather than to support a decision already made [by him]."

10/12/01 Mem. Op. at 9-10 (quoting Petroleum Info. Corp. v. Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992), and Renegotiation Bd. v. Grumman Aircraft, 421 U.S. 168,184 (1975)). However, after hearing the testimony of six witnesses (including Plaintiff) over a two day period and carefully reviewing the eight exhibits submitted therein by the Defendant, the Court is now able to find that Mr. Giron had not decided to administratively separate Horowitz at the time he drafted the document.

The Plaintiff offered testimony from himself and Mr. Lopeti Foliaki, who is a Tongan lawyer, that was briefly retained

by Mr. Horowitz in this matter. Mr. Foliaki testified that he met personally with Mr. Giron on March 15, 1999 to discuss the allegations against Plaintiff and the Peace Corp's intended actions. See generally Evidentiary Hearing Transcript ("Tr.") of 10/10/02 at pp. 152-58. On direct examination, Mr. Foliaki testified that Mr. Giron emphatically told him that "Dr. Horowitz will be administrativelyy separated." Tr. at 155:16-20. However, in the ensuing cross examination, Mr. Foliaki's testimony indicated that a different result would occur:

> Q. [Counsel for Defendant]. Do you know whether or not Arturo Giron ever made a decision to separate Michael Horowitz or take any other action in connection with the allegations that he had received against him?
> A. [Mr. Foliaki]. No, I don't
> Q. Do you have any idea whether he did or not?
> A. My information from Michael [Horowitz] is that he did.
> Q. From Michael?
> A. But only from Dr. Horowitz, yes.
> Q. I see. Besides what Michael told you, do you have any information at all whether he did or not?
> A. No.

Oct. 10, 2002 Tr. at 169:3-14. Several minutes later, Mr. Foliaki again stated that he did not know whether Arturo Giron had decided to separate Plaintiff as of March 18, 1999:

> Q [Counsel for Defendant]. This is an exhibit to your deposition; it's marked deposition Exhibit Number 1, Foliaki. Can you turn to that? It's at the back of your deposition transcript.
> A [Mr. Foliaki]. Yes.
> Q. Did you write this letter, sir?
> A. I didn't hear the question.
> Q. Did you write this letter, sir?
> A. Yes.
> Q. And what is the date of this letter?
> A. 18 March, 1999.
> Q. And why did you write this letter, sir?

A. I was instructed to write it by Dr. Horowitz. The purpose of it was to get before the Peace Corps volunteer whose name – who received the complaint from the John Doe, to get information to her regarding the facts to indicate that John Doe may not be telling all the truth.
Q. And was it a goal of yours or your client's in writing the letter that it might help him to either – it might help him with regard to his status as a Peace Corps volunteer?
A. Might help his status? Yes, I think so.
Q. You believe that if you were able to persuade the Peace Corps, that he might remain in Tonga as a Peace Corps volunteer, is that correct?
A. Yes, yes.
Q. And at that date, March 18th, you still had hope in your heart as you testified, that the decision would be to allow Michael to continue as Peace Corps volunteer, and so in part, that was the basis for the letter; is that correct?
A. Yes.
Q. And just to confirm, the fact that you had hope in your heart, as the phrase has been used, that was because in your mind there had not yet been a final decision which would have dashed all hope?
A. Well, the hope in my heart was that yes, that a final decision – and if a final decision had been made, that Michael could get reinstated.
Q. If it had been made. But at that point did you know whether it had been made or not?
A. No, I didn't.

Oct. 10, 2002 Tr. at 179:24-181:14. Mr. Foliaki's testimony that he did not know on March 18, 1999, two days after Mr. Horowitz had resigned, whether Arturo Giron had decided to separate Plaintiff is further evidence that such a final decision had not been made.

The Court also carefully examined the demeanor and testimony of Plaintiff Horowitz at the two day evidentiary hearing. Mr. Horowitz was continually elusive in his answers to cross-examination and testified differently than he had in his

earlier deposition and submissions to the Court. Examples include:

– Whether he physically appears on the campus where he is a visiting scholar, See Oct. 15, 2002 Tr. at 12:22-14:23.

– Whether he had asserted a claim that the draft ASR in question had been destroyed by the defendant. See Oct. 15, 2002 Tr. at 16:17-24:9.

– Whether he was given pro bono legal advice by "a large number of attorneys." See Oct. 15, 2002 Tr. at 43:14-45:12.

– Whether he recalled expressing a concern that the allegations against him were "unfairly nonspecific" and whether he had the opportunity to respond to those allegations. See Oct. 15, 2002 Tr. at 46:17-57:7.

– Whether he recalled that Sally Olsonoski and Arturo Giron were in touch with Peace Corps headquarters in Washington at "every opportunity they had" regarding this matter. See Oct. 15, 2002 Tr. at 58:2-59:9.

In addition to all of this contradictory testimony, Mr. Horowitz admitted knowing on March 16, 1999 – the date he resigned – that Mr. Giron would not independently make the decision to administratively separate him:[6]

> Q. [Counsel. for Defendant]. Did Mr. Giron or Ms. Olsonosi ever tell you that Peace Corps headquarters ever instructed them as to what the disposition of this matter should be?
> A. [Mr. Horowitz]. They never did.
> Q. Okay. But you believe that Washington was calling the shots, isn't that your testimony?
> A. Yes, and they –
> Q. That's –
> A. And they confirmed it.
> Q. And they confirmed it. (Tr. at [illegible].

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[6] [*REDACTED*.]

A. To my satisfaction, they confirmed it; perhaps not to yours.

Q. They confirmed what?

A. That in fact they were getting orders from Washington and not moving independently.

Oct. 15, 2002. Tr. at 62:2-17. This testimony by Mr. Horowitz actually supports Arturo Giron's testimony, since Mr. Giron repeatedly stated that he had not yet decided whether to administratively separate Mr. Horowitz before Mr. Horowitz resigned. See, e.g., Oct. 10, 2002 Tr. at 59:22-61:12; 63:14-64:2; 66:1-73:21.

The Court also carefully examined the draft ASR, which was submitted for an *in camera* review as part of the overall evidentiary record in this case.

The ASR in question has three distinct sections. The first is entitled "Grounds for Administrative Separation" and lists [*REDACTION BEGINS ... REDACTION ENDS.*] The Court finds further evidence of this by examining an e-mail exchange between Mr. Giron and personnel at Peace Corps Headquarters. On March 12, 1999, for example, Mr. Giron wrote to personnel in the Peace Corps General Counsel's Office and stated: "Sally [Olsonoski] and I will be meeting with Michael again on Monday [March 15, 1999] at 4:30 p.m. I really would like to have a final decision on this made by then ... I am now completely confused about how to proceed ... Please send me either really clear guidance from your perspective, or a great deal more wisdom." Def. Exhibit 4.

Finally, Mr. Giron's in-court testimony supports his claim that he had not yet decided whether to administratively separate Mr. Horowitz before Mr. Horowitz resigned. See, e.g., Oct. 10, 2002 Tr. at 59:22-61:12; 63:14-64:2; 66:1-73:21. After witnessing Mr. Giron's demeanor on the witness stand, the Court has been presented with no evidence or indication that Mr. Giron was anything less than forthright and truthful in this testimony.

Having evaluated the credibility of all of the witnesses at the evidentiary hearing on October 10, 2002 and October 15, 2002, and having fully considered all of the evidence, the Court agrees with, adopts, and incorporates herein the Defendant's Proposed Findings of Facts and Conclusions of Law.[7] Accordingly, the Court now finds that the document was "'prepared in order to assist [Giron] in arriving at his decision,' rather than to support a decision already made [by him]." Petroleum Info. Corp., 976 F.2d at 1434 (quoting Renegotiation Bd., 421 U.S. at 184). As the ASR was both predecisional and deliberative, Exemption 5 applies and the Defendant is justified in withholding this document from Plaintiff Horowitz.

III. MOTION TO STAY DISCLOSURE OF THE THIRD PARTY COMPLAINANT'S IDENTITY

In the Court's Memorandum Opinion and Order of February 26, 2002, a portion of the Court's Order of October 12, 2001, directing the release of the identity of the third-party complainant, was stayed until final judgment on the applicability of Exemption 5 was entered. As that final judgment is entered today, the Court now lifts the stay and orders the release of the identity of the third-party complainant. The Court takes this action not only under the rationale set forth in the Court's Memorandum Opinion of 10/12/01 at 10-15, but under the "reasonably segregable" requirement. The FOIA requires that "[a]ny reasonably segregable portion of a record" must be released after appropriate application of the Act's nine exemptions. 5 U. S.C. § 552(b) (sentence immediately following exemptions). Further, our Court of Appeals has held that District Courts "ha[ve] an affirmative duty to consider the segregability issue *sua sponte*." Trans-Pacific Policing Agreement v. United States Custom Serv., 177 F.3d 1022, 1028 (D.C. Cir. 1999).

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[7] For the sake of brevity, those Proposed Findings of Facts and Conclusions of Law [# 63] will not be reproduced in this Memorandum Opinion.

Plaintiff's Second Amended Complaint in this case seeks relief in the form of obtaining the ASR. The Court has denied Plaintiff's request under both Exemption 5 and the Privacy Act claim. However, while the Peace Corps is not required to turn over to Mr. Horowitz a copy of the entire ASR, it is required to provide him with the name of the third-party complainant. The court has stayed the litigation in a related case, Civil No. 00-1195 (TFH).[8] The complaint in that case is replete with allegations dealing with events surrounding Mr. Horowitz's resignation from the Peace Corps. That complaint includes assertions by Mr. Horowitz regarding his interaction with the third-party complainant, which form part of the factual background in that case. The record in Civil No. 00-1195 is not fully developed, and further proceedings in that case may require the use of the name of the third-party complainant. While it may turn out that Mr. Horowitz can easily obtain the name through discovery, he should not be precluded from doing so merely because that name is written on a draft ASR report to which he may not have access. To require Mr. Horowitz to file a FOIA request in Civil No. 00-1195 just to obtain the name of the third-party complainant would unnecessarily delay that case. See Senate of the Commonwealth of Puerto Rico. v. United States Dep't of Justice, 823 F.2d 574, 580 (D.C. Cir. 1987) ("the 'interests of judicial finality and economy' have special force in the FOIA context, because [of] the statutory goals – 'efficient, *prompt,* and full disclosure of information' ... ") (citations omitted) (emphasis in original).

In sum, while the Peace Corps is not required to turn over the ASR, under both the rationale set forth in the Court's Memorandum Opinion of 10/12/01 at 10-15 and the "reasonably segregable" requirement the Peace Corps must disclose to Plaintiff Horowitz the name of the third party complainant.

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[8] That stay will be lifted this same day by a separate Order of the Court.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Exemption 5 of FOIA, the deliberative process privilege, allows the Peace Corps to withhold release of the ASR in question. Further, the Court lifts the stay of disclosure of the third-party complainant's identity. As Plaintiff's Second Amended in this case seeks relief in the form of obtaining the ASR, and the Court has denied that request, this case is dismissed with prejudice.

An appropriate order will accompany this Memorandum Opinion.

January 6th, 2004

Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL G. HOROWITZ, Ph.D.,	)
	)
Plaintiff,	)
	)
v.	**Civ. No. 00-0848 (TFH)**
	)
PEACE CORPS,	**REDACTED VERSION**[1]
	)
Defendant.	)

FILED
JAN 06 2004
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Exemption 5 of the Freedom of Information Act allows the Peace Corps to withhold release of the draft Administrative Separation Report ("ASR") in question. It is further

ORDERED that the stay of disclosure of the third-party complainant's identity is lifted. Finally, as Plaintiff's Second Amended Complaint in this case seeks relief in the form of obtaining the ASR, and the Court has denied that request, it is therefore

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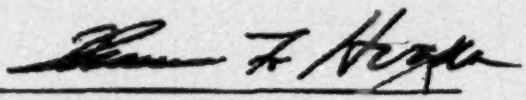
[1] Information contained in the non-redacted memorandum opinion was obtained from a document submitted to the Court *in camera* and under seal. Accordingly, that non-redacted opinion is available only to the Court.

ORDERED that judgment is entered for the Defendant and Plaintiff's case is **DISMISSED WITH PREJUDICE.** This is a final appealable Order pursuant to Federal Rule of Appellate Procedure 4(a).

SO ORDERED.

January 6th, 2004



Thomas F. Hogan
Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL G. HOROWITZ, Ph.D.,	)
	)
Plaintiff,	)
	Civil Action No. 00-0848 (TFH)
	)
PEACE CORPS,	)
Defendant.	)
	)

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Findings of Fact

1. Arturo Giron was, from mid-1998 through January 2001, the Peace Corps Country Director for the Kingdom of Tonga. As such, he had general oversight of the Peace Corps programs, including responsibility for individual Peace Corps volunteers (sometimes herein "volunteers").

2. On Sunday, March 7, 1999, Mr. Giron received a phone call from a volunteer who expressed concerned, and asked to meet with him, about allegations made to her by a Tongan high school student. Later that same day, Mr. Giron met with the volunteer ("March 7th meeting"), who related to Mr. Giron, with greater specificity, the allegation of potential sexual misconduct between another volunteer, Michael Horowitz, and a male Tongan student at 'Atenisi High School. It appeared, at the time that the allegations were communicated to Mr. Giron, that the Tongan student had been "underage" – that is, under 18 – at the time of the potential sexual misconduct. Mr. Horowitz was a teacher at 'Atenisi High School.

3. Immed[illegible] after the March 7th meeting, Mr. Giron began to review th[illegible]ace Corps Manual to see if it had appropriate guidance on how to proceed in the circumstances of what Mr. Giron believed was a serious allegation.

4. Peace Corps Manual Section 284 ("MS 284," Defendant's Exhibit 2) provides a structured process by which a country director is required to investigate and resolve allegations of volunteer misconduct. Although MS 284 is titled "Early Termination of Service," the "administrative separation process" that MS284 describes can result in a number of dispositions, including but not limited to a letter of reprimand, the transfer of a volunteer from one site or program to another, imposition of conditions on Peace Corps service, or nothing at all. MS 284 subparagraph 4.5.1. Subparagraph 4.4.2. provides a checklist of steps that the country director (who is, under MS 284, a "deciding official") must follow in investigating such allegations. Among the requirements under that checklist are (a)"[i]nform the volunteer or trainee that administrative separation is being considered and identify the specific conduct or allegations that will constitute grounds for administration;" (b) provide the volunteer with a copy of MS 284 and explain appeal rights; (c) provide the volunteer with the opportunity to ask questions, respond to the allegations, and provide additional information; and (d) "[r]emind the volunteer ... that he or she may resign from Peace Corps service at any time."

5. After reviewing the Peace Corps Manual, Mr. Giron wrote a lengthy e-mail memorandum to Steve Schwinn, a lawyer in the Peace Corps General Counsel's office in Washington, D.C., with whom Mr. Giron had frequent previous contact regarding other matters. That e-mail, dated March 7, 1999, 2:46 pm ("March 7th e-mail," Defendant's Exhibit 1), explicitly sought guidance from Mr. Schwinn and the General Counsel's Office regarding how to proceed, and detailed the allegations that had been related to Mr. Giron from the female volunteer. Mr. Giron had not, during his then-nine-month tenure with the Peace Corps,

had any occasion on which to deal with allegations of volunteer misconduct as serious as the subject allegations, and had never initiated any MS 284 process. Both MS 284 and training programs presented by the Peace Corps' Office of General Counsel encouraged country directors to consult with the Office of General Counsel in dealing with these matters. The March 7th e-mail was the starting point in what was to become an almost daily bout of communications – including hours of phone conversations sometimes two and three times a day – between Mr. Giron, on one hand, and the Office of General Counsel and other senior-level officials at Peace Corps headquarters in Washington, D.C. ("Headquarters"), on the other, concerning the subject allegations.

6. While all of the details of the allegations reported in the March 7th e-mail are not essential to resolving this case, some aspects of those reported allegations assist in explaining the complexity of the matter confronting Mr. Giron, a factor that supports his testimony that he had no intention of rendering any final decision on the matter without first securing the views of the Peace Corp's Office of General Counsel.[1] In that regard, the allegations reported in the March 7th e-mail include references to (a) the Tongan student's initial rejection of Mr. Horowitz's invitation to take a shower while at Mr. Horowitz's house and subsequent agreement to do so after "Michael continued to ask repeatedly," Defendant's Exhibit 1; (b) Mr. Horowitz's undressing and joining the Tongan student in the shower; (c) hand/genital contact therein (the March 7th e-mail specifies, "(this part is unclear)"); (d) the Tongan student's hurried departure from Mr. Horowitz's house after becoming upset, and (e) the Tongan student having reported to the female volunteer that he considered going to the police but had not yet done so.

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[1] Other factors that support that testimony are the following: (a) Mr. Giron's frequent phone communications with the Peace Corp's Office of General Counsel during the period between the emergence of the allegations and Mr. Horowitz's ultimate decision to resign from Peace Corps service, seeking guidance every step of the way; (b) Mr. Giron's

7. The March 7th e-mail, a contemporaneous writing with respect to the March 7th meeting, also reported: "I have asked this volunteer to give me some time to get guidance from Washington before taking any action ... I read the PCV conduct policy carefully and I think that I need to get guidance from you and possible OSS [Office of Special Services]." As to the appropriate course of action in these circumstances, the March 7th e-mail stated,

> I also believe that this conduct/incident could lead to early termination of Michael Horowitz' service with the Peace Corps but there are enough questionable areas that I think I need to know more and investigate .... I would like to hear your opinions on an appropriate course of action .... I have not and will not discuss this with any other staff here until I hear from you, although I would like to seek the advice of my senior Tongan APCD [associate Peace Corp Director], Drew Havea, as soon as possible .... I will also not speak to the young Tongan man involved until I get clearer guidance from you and possibly OSS, although I think that this incident is serious enough that I should investigate and take quick action. Please reply by e-mail or better still phone me so we can think this through together ....

Id.

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stream of faxes and e-mails to the Office of General Counsel regarding his findings on the incident as they emerged, see Defendant's Exhibit 1, 3, 4; (c) Mr. Giron's articulated concerns about the legal implications of the alleged incident in view of the prohibition on homosexual activity in Tonga; (d) MS 284's explicit encouragement that country directors consult with the Office of General Counsel in undertaking the MS 284 process; and (e) Mr. Giron's lack of experience in dealing with alleged volunteer misconduct of this nature.

8. Within the next one or two days, Mr. Giron and his APCD Sally Oslonoski had a two-hour teleconference with several senior-level officials at Peace Corps headquarters in D.C. ("Headquarters"). Mr. Giron recalls that the lawyers' response to the situation, as expressed during the teleconference, was that "we should collectively be very faithful to the process and the policies of Peace Corps, that we should stay within the lines, so to speak." Transcript of 10-10-02 hearing ("10-10 Tr.") at 27, lines 2-5.

9. Mr. Giron subsequently interviewed the Tongan student, who related allegations very similar to those that had been related to Mr. Giron by the female volunteer. Then, on March 12th, Mr. Giron and Ms. Olsonoski met with Mr. Horowitz. Mr. Giron recalls that Mr. Horowitz recognized the incident, but explained to Mr. Giron that the incident was consensual; that the Tongan student was 18 at the time; and that Mr. Horowitz always made certain that his sexual partners were 18. See also Defendant's Exhibit 3.

10. Mr. Giron appreciated the legal implications of Mr. Horowitz's version of events, and particularly the complexities involved in sorting out the appropriate manner in which to proceed in light of them. Again he looked to the Office of General Counsel for guidance, sending Steve Schwinn an e-mail dated March 12, 1999, 7:18 p.m., Defendant's Exhibit 4, explaining that, "There is no age of majority in Tonga for boys," but that "it is very clear that Michael's behavior does put him at risk of prosecution under Code 139 .... I don't know where this leaves us. There is no clear age of majority, but homosexual acts are illegal under the law here. In our culture, we have a clear age of majority, but homosexuality itself is not illegal in many jurisdictions" *Id.* Mr. Giron continued, "I am now completely confused about how to proceed, even if we develop documentary evidence of [the Tongan student's] age. Please send me either really clear guidance from your perspective or a great deal more wisdom." *Id.*

11. At some point prior to March 16, 1999, Mr. Giron started drafting a document in response to a request by Steve Schwinn that Mr. Giron prepare a report to be used as a focal point for further discussion and that could be reviewed by the lawyers in Washington. In preparing the document, Mr. Giron undertook a "cut and paste" regarding all the "source documents" that he had generated up to that point in time (notes and memoranda regarding meetings he had had with Mr. Horowitz, and the Tongan student and other matters). Mr. Giron credibly testified that the purpose of the document was "so that we could put all the relevant issues with respect to the incident and the case into one, you know, single, cohesive document .... And the legality of it, I mean, there were legal issues. I'm not a lawyer. I mean the lawyers would obviously need to go through this with a fine-tooth comb ...." 10-10 Tr. at 53, line 23, through 54, lines 5. Mr. Giron incorporated into the document all of the relevant facts that he believed were accurate. Mr. Giron testified, while looking at the subject document during the evidentiary hearing in this case, that the draft document, which had been designed to conform to the pre-existing, electronically-available template for administrative separation reports, had only the first three of five required sections completed.

12. No final decision was made in the draft document regarding the incident or any potential administrative separation of Mr. Horowitz. Mr. Giron testified that "[w]e were still in the process of deliberating ... we never got to [the] point of [deciding which facts would support a possible administrative separation] ... I mean, remember, this was strictly a first draft. It had ... it received no review, so I pretty much cut and paste just about everything that I felt was relevant and important and true into this document." 10-10 Tr. at 54-55.

13. On March 16, 1999, prior to a meeting in which Mr. Horowitz would announce that he had decided to resign, Mr. Giron e-mailed the draft document to Headquarters, and specifically to Steve Schwinn, other lawyers in the General

Counsel's office, and other senior officials there. Mr. Giron submitted a cover e-mail, dated March 16, 1999, that stated, "Folks. Horowitz admin sep. report enclosed. Please review and send comments/changes to Sally [Olsonoski]. Please CC me as well." Defendant's Exhibit 5.

14. At the time that Mr. Giron had sent the March 16, 1999 e-mail, he had plans to leave Tonga within the next few days to attend his aunt's funeral. He had appointed Sally Olsonoski to be acting Country Director in his absence, and to take charge of the matter dealing with Mr. Horowitz. It was for that reason that the March 16, 1999 cover e-mail designated Ms. Olsonoski as the recipient of comments about the draft document. Mr. Giron's transfer of the authority of acting Country Director to Ms. Olsonoski included the transfer of responsibility for making any final determination regarding Mr. Horowitz's possible administrative separation. Ms. Olsonoski was prepared to make that decision. *See* 10-10 Tr. at 114, lines 19-23 ("I assured [Mr. Giron] that I felt confident in my abilities, that I had successfully followed the [MS 284] procedure in the past, and that I felt that with the help of Washington and general counsel that I would reach the right decision.") If Mr. Giron had made a final determination regarding whether to administratively separate Mr. Horowitz, then, he would have had to have told Ms. Olsonoski, for she was about to take over his responsibilities in connection with the subject matter. Ms. Olsonoski credibly testified that Mr. Giron never told her that he had made any such final decision, and that precisely the opposite was true – that Mr. Giron's conduct and statements in connection with the matter suggested that he was waiting for Headquarters to make a final determination regarding a possible administrative separation.

15. At a meeting later in the day on March 16, 1999, with Mr. Giron and Ms. Olsonoski, Mr. Horowitz announced that he had decided to resign. Mr. Giron subsequently communicated that information to Headquarters. Neither prior to that meeting, nor at any point in time thereafter, did Mr. Giron or Ms. Olsonoski

receive any response from Headquarters regarding the draft document. The need for finalization of any determination having come to an end, the draft document became irrelevant, and would have been destroyed had Mr. Horowitz not procured the agreement of Mr. Giron to keep the draft document in a safe in the Peace Corps' offices in Tonga. There is no evidence that the Office of General Counsel ever made any final determination regarding whether to counsel Mr. Giron to administratively separate Mr. Horowitz. There is also no evidence that Mr. Giron would have made a final decision as to whether to administratively separate Mr. Horowitz without first procuring definitive counsel one way or the other from the Office of General Counsel, and an ample record of evidence suggesting that Mr. Giron had no intention of making a decision without definitive counsel from the Office of General Counsel. *See, e.g.*, Defendant's Exhibit 4 at 1 ("Sally and I will be meeting with Michael again on Monday at 4:30 p.m. I really would like to have a final decision on this made by then.").

16. In accordance with MS 284, Mr. Giron reminded Mr. Horowitz many times throughout the MS 284 process that Mr. Horowitz was free to resign as a Peace Corps volunteer. While Mr. Giron testified that he may have referenced the draft document in his discussions with Mr. Horowitz prior to Mr. Horowitz's announcement of his decision to resign, and may have let Mr. Horowitz know, in the interests of full and fair disclosure, that the document was being sent to Washington D.C., there is no credible evidence that Mr. Giron disclosed this information with the intent to coerce Mr. Horowitz to resign. Nor is there credible evidence that Mr. Giron disclosed this information to give Mr. Horowitz the impression that a final determination had been made to administratively separate Mr. Horowitz. Both Mr. Giron and Ms. Olsonoski testified that Mr. Giron never said to Mr. Horowitz, at any of their meetings with Mr. Horowitz, that a final administrative separation determination had been made, or that Mr. Giron was on the verge of administratively separating Mr. Horowitz. There is no credible evidence that Mr. Giron opted to

discuss with Lopeti Foliaki, Mr. Horowitz's Tongan lawyer, the Peace Corps' internal deliberation processes regarding the possibility or probability that Mr. Horowitz would be administratively separated, as Mr. Foliaki testified. Mr. Giron was particularly credible when he explained that he would not have had a substantive discussion with a lawyer representing Mr Horowitz "without my own lawyer present if there is a lawyer on the other side." 10-10 Tr. at 63, lines 9-11.

Conclusions of Law

1. Exemption 5 of the FOIA protects from disclosure, *inter alia*, "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption protects documents "that are normally privileged in the civil discovery context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see also FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

2. The deliberative process privilege is a civil discovery privilege that "prevent[s] injury to the quality of agency decisions," NLRB v. Sears, Roebuck & Co., 421 U.S. at 151, by protecting predecisional communications – those "antecedent to the adoption of an agency policy," Jordan v. U.S. Department of Justice, 591 F.2d 753, 774 (1978) – and that are also deliberative in that the communication "makes recommendations or expresses opinions on legal or policy matters," Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). See also Mapother v. Department of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative") (citing Petroleum Info. Corp. v. United States Dep't of the Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992)); Federal Trade Commission v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (the privilege "permits the government to withhold documents that reflect advisory opinions,

recommendations and deliberations comprising part of a process by which government decisions and policies are formulated"); Grand Central Partnership, Inc. v. Cuomo, 166 F.3d 473, 482 (2nd Cir. 1999) (referencing Renegotiation Bd. v. Grumman Aircraft Eng. Corp., 421 U.S. 168, 184 (1975) and Hopkins v. U.S. Dep't of Housing and Urban Development, 929 F.2d 81, 84 (2d Cir. 1991)); Judicial Watch, Inc. v. U.S. Dep't of Commerce, 90 F. Supp.2d 9, 14 (D.D.C. 2000) (citing to Access Reports v. U.S. Dep 't of Justice, 926 F.2d 1192, 1194 (D.C. Cir. 1991)). The burden is on the agency asserting the deliberative process privilege in a FOIA case to show that the information in question satisfies both the "predecisional" and "deliberative" requirements. Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

3. In determining whether material falls within the realm of the deliberative process privilege, " ... the critical question is whether 'disclosure of the materials would expose an agency's decision making process in such a way as to discourage candid discussion and thereby undermine the agency's ability to perform its functions.'" Eugene Burger Management Corp. v. U.S. Department of Housing and Urban Development, 192 F.R.D. 1, 5 (D.D.C. 1999) (quoting Chemical Weapons Working Grp v. U.S. Environmental Protection Agency, 185 F.R.D. 1, 2-3 (D.D.C. 1999) (citing Dudman Comm. v. Dep't of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). The privilege

> serves to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated and adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and

rationales for a course of action which were not in fact the ultimate reasons for the agency's action.

Coastal States Gas Corp., 617 F.2d at 866 (citing to Jordan v. U.S. Department of Justice, 591 F.2d at 772-74). "Exemption 5 is manifestly not meant to isolate agency decision makers from public opinion or to silence public voices. But the statutory framework of the APA allows agencies a space within which they may deliberate." Wolfe v. Department of Health and Human Services, 839 F.2d 768, 776 (D.C. Cir. 1988). The deliberative process privilege "protects the integrity of the decision-making process itself by confirming that officials should be judged by what they decided(,) not for matters considered before making up their minds." Jordan v. U.S. Department of Justice, 591 F.2d at 772-73 (citations omitted).

4. "A document is predecisional if its was 'prepared in order to assist an agency decisionmaker in arriving at his decision,' rather than to support a decision already made." Petroleum Info. Corp., 976 F.2d at 1434 (quoting Renegotiation Bd., 421 U.S. at 184). "Documents which are protected by the privilege are those which would inaccurately reflect or prematurely disclose the views the agency, suggesting as agency position which is as yet only a personal position .... even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as an agency position on an issue or is used by the agency in its dealings with the public." Coastal States Gas Corp., 617 F.2d at 866.

5. The draft document at issue in this suit is an intra-agency communication that is predecisional for purposes of the deliberative process privilege. The document is a draft version of a report reflecting one possible outcome of the MS 284 process, which process, because Mr. Horowitz resigned, was never completed and was never required to be completed. The draft document is predecisional because it was prepared at a point in time before the agency reached any decision regarding what

action to take, if any, in connection with the MS 284 process as applied to Mr. Horowitz.

6. Mr. Giron did not adopt, formally or informally, the subject draft document as the agency position regarding the underlying matter in this case. Nor did he "use" it in his dealings with Mr. Horowitz to represent that the Peace Corps had made a final decision regarding administrative separation of Mr. Horowitz. See Coastal States Gas Corp., 617 F.2d at 866.

7. Moreover, the draft document was clearly deliberative, reflecting Mr. Giron's first attempt to sift through the various items of evidence of the subject allegations, and determine, and then articulate, what facts might be relevant or appropriate to include for consideration in the course of effecting a potential administrative separation regarding those allegations. Mr. Giron drafted the document to provide Peace Corps lawyers and other Peace Corps headquarters officials with a factual analysis upon which they might rely in evaluating whether a decision to administratively separate plaintiff was legally justified and appropriate as a policy matter. Such a document is protected under the deliberative process privilege.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL G. HOROWITZ, Ph.D.,	)
	)
Plaintiff,	)
	Civil Action No. 00-0848 (TFH)
	)
	)
PEACE CORPS,	)
Defendant.	)
	)

ERRATA

Defendant Peace Corps, by undersigned counsel, hereby files this *errata* to correct the following in its Proposed Findings of Fact and Conclusions of Law:

The last sentence of Paragraph 2, as previously filed, states: "Mr. Horowitz was a teacher at 'Atenisi High School." It should read: "Mr. Horowitz was a teacher at 'Atenisi University, a learning institution affiliated with Atenisi High School."

Respectfully submitted,

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APPENDIX E

MS 284: Early Termination of Service

Effective Date: 7/26/96 (v.3)
Supersedes: MS 284, 2/23/90; 2/7/84
Responsible Office: Office of Special Service (VS/SS)

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4.0 ADMINISTRATIVE SEPARATION

Administrative separation is a determination by the Peace Corps that, in the interest of all concerned, a V/T should not continue with Peace Corps service. The decision to administratively separate a V/T has serious consequences, and should not be made without due consideration of all facts and circumstances.

4.1 Documenting and Correcting Unsatisfactory Conduct

Upon becoming aware of a V/T's unsatisfactory conduct, Peace Corps Staff should, if appropriate, develop a mutually agreed upon plan with the V/T to correct the unsatisfactory conduct. The V/T should be informed if the conduct could be grounds for Administrative Separation. Staff should document the plan and provide the V/T with an opportunity to comply with the plan. Staff should also document whether the V/T's compliance with the plan was satisfactory or not and, if it was not, the extent to which the V/T's conduct continued to be unsatisfactory. Repeated unsatisfactory conduct warrants consideration of administrative separation.

It is essential that the grounds for administrative separation be well documented (both before and during the administrative separation procedure). In cases where the grounds for administrative separation are the cumulative result of conduct that persists over a period of time (e.g., unsatisfactory work performance), it is important to have documented the prior efforts to work with the V/T to correct the unsatisfactory conduct (see also MS 204).

4.2 Grounds for Administrative Separation

A V/T may be administratively separated for a violation of any policy in the Peace Corps Manual, or any other policy manual for Peace Corps Volunteers or Trainees, whether Agency-wide or developed for an individual country program.

Because of the seriousness of the offense, a violation of Peace Corps policy regarding involvement in intelligence gathering or activities, or use of illegal drugs, will result in administrative separation.

A violation of the motorcycle helmet policy will also result in administrative separation except in extraordinary circumstances, for example, if the Deciding Official determines that the threat of imminent harm to the V/T outweighs the risks associated with failure to wear a helmet.

Refusal to take required vaccinations or medical prophylaxis will also result in administrative separation. The Peace Corps Medical Officer should consult with VS/MS on all cases of refusal to take required vaccinations or medical prophylaxis prior to recommending administrative separation to the Country Director.

As stated above, any violation of any Peace Corps policy may be grounds for administrative separation. The table below shows some common types of policy violations that serve as grounds for administrative separation.

Grounds for Administrative Separation

A	Failure to meet the Trainee selection standards in MS 201 or the standards developed for an individual country program.

B	Conduct that presents a reasonable possibility of (i) injury or physical harm to the Volunteer, Trainee or others, or (ii) loss or destruction of property, including but not limited to: 1. Violation of motorcycle policy, such as failure to wear a helmet while driving or riding a motorcycle, or carrying an unhelmeted passenger on a motorcycle (MS 523). 2. Consistent failure to follow medical advice or policies, including refusal to take required immunizations or prophylaxes (MS 262). 3. Failure to follow region- or country-specific safety policies (e.g., failure to wear life jacket while traveling by boat).
C	Conduct during Peace Corps training or service that could substantially diminish the individual's effectiveness as a Volunteer or Trainee, or that could have a serious adverse impact on other Volunteers, the Peace Corps, or on individual country programs, including, but not limited to: 1. Use of drugs that are illegal in the United States or in the host country (MS 204). 2. Active involvement with any (U.S., host country, or other nation) intelligence

	gathering or counter-intelligence efforts, including drug enforcement or control programs (MS 201). 3. Arrest or conviction for any criminal offense under State, Federal, or host country law. In certain circumstances, investigation of a Trainee or Volunteer by local authorities may be grounds for administrative separation (MS 201). 4. Unsatisfactory work performance, including, but not limited to, failure or refusal to perform a Volunteer or Trainee assignment (MS 204). 5. Unauthorized absence from work, training, or other assigned sites including unauthorized travel to a third country.
D	Information revealed as a result of a National Agency Check, full field investigation or other source indicating either that the individual is unsuited for Peace Corps service by reason of conduct prior to Peace Corps enrollment or would present a risk to the national security of the United States if allowed to continue Peace Corps service (for cases involving fraud, deception, intentional false statements or material omission, see paragraph 7.0).

4.3 Deciding Official for Administrative Separation
The Deciding Official for administrative separation is as follows:

- **Regional Director** – during staging;
- **Country Director** – during pre-service training training or Volunteer service;
- **Country Director of third country** – during training in a third country; and
- **VRS/Placement Division Chief supervising legal eligibility and security checks** – for grounds related to legal eligibility or security (see 7.0, "Submission of Deceptive or Incomplete Information in Obtaining Selection to the Peace Corps").

If a V/T is subject to administrative separation while in the U.S. on leave, the Country Director may delegate his/her authority as Deciding Official to the Regional Director.

4.4 Administrative Separation Procedures

4.4.1 Purpose of procedures

The procedures outlined below are meant to ensure that:

- The V/T knows that his/her behavior could be grounds for administrative separation, and he/she has been given information about administrative separation procedures.
- The V/T is given the opportunity to present his/her side of the issue.
- The Deciding Official reviews the allegations, ensures that an independent investigation and assessment are completed, and properly documents actions taken before and during the administrative separation process.
- If a decision to administratively separate is made, the Deciding Official must:

– Base the decision on one or more of the grounds contained in this Manual Section;
– Comply with the administrative separation procedures outlined in this Manual Section;
– Base the decision on an objective analysis of the facts; and
– Identify the facts that reasonably support the conclusion to administratively separate the V/T.

- The V/T is aware of the right to appeal administrative separation and has been informed of the steps in the appeal process.

4.4.2 Checklist

The following is a checklist of the steps a Deciding Official, or staff member, must follow (and document) when considering administrative separation of a V/T:

□ Inform the V/T that administrative separation is being considered, and identify the specific conduct or allegations that would constitute grounds for administrative separation.
□ Explain the administrative separation process, including the V/T's right to appeal and appeal procedures, and provide the V/T with a copy of MS 284.
□ Provide the V/T with an opportunity to ask questions and respond to the allegations, as well as to provide any additional information, documents, or testimony on his/her behalf.
□ Remind the V/T that he or she may resign from Peace Corps service at any time. A Deciding Official must advise a V/T who elects to resign that he/she cannot appeal the resignation under any circumstances.
□ Review the allegations and available information, including any additional information, documents or testimony provided by the V/T. Conduct, or designate

a staff member to conduct, any further fact-finding necessary to reach a decision consistent with the standards in paragraph 4.6.4.

□ Give the Volunteer an opportunity to hear and respond in person to the information obtained related to the allegations and grounds for administrative separation.

NOTE: The Deciding Official is strongly encouraged to consult with the Office of General Counsel (GC) on procedural issues and with the Office of Special Services (VS/SS) on issues of counseling, preventive intervention, and documentation.

4.5 Disposition by the Deciding Official

The Deciding Official shall make a decision based on objective review of the V/T's response and of all facts from investigation. The Deciding Official shall ensure that the decision is consistent with the needs of the program and meets the standards listed under paragraph 4.6.4.

4.5.1 Disposition options

The Deciding Official has the following options:

- **Decide not to administratively separate the V/T, and impose no conditions on the V/T's further Peace Corps service.**
- **Decide not to administratively separate the V/T, but impose conditions on further Peace Corps service by the V/T.** The Deciding Official should make a written record of the alleged conduct and the necessary corrective action, and note that he/she will commence the administrative separation process again if corrective action is not taken within a specified time frame or if the V/T violates the same policy again. The

Deciding Official should give the V/T a copy of this written statement.

- **Administratively separate the V/T.** The Deciding Official should give the V/T a copy of the completed Administrative Separation Report and remind the V/T of his/her right to resign from Peace Corps service at any time (see paragraph 4.5.2 below).

The Deciding Official should also give the V/T instructions for completing the Volunteer/Trainee Statement in the Administrative Separation Report. The V/T may write a statement regardless of whether he/she intends to appeal. If the V/T appeals, the Deciding Official may write a response at the end of the Volunteer/Trainee Statement. (See Attachment A, "Administrative Separation Report.")

The Country Director must ensure that appropriate travel arrangements are made for the V/T and that the Early Termination Cable, Description of Service Statement and other documentation are completed. The V/T may travel to his/her home of record via Washington, DC, if he/she chooses a PC/Washington consultation. See 8.0 "Early Termination Travel" and 9.0 "Required Documents for Early Termination."

4.5.2 Resignation in lieu of administrative separation

Volunteers and Trainees have the option of resigning in lieu of being administratively separated. A V/T who elects to resign must be advised that a resignation cannot be appealed under any circumstances.

- If a V/T resigns before the decision to administratively separate has been made, the Administrative Separation Report should not be completed.

- If a V/T resigns after the decision to administratively separate has been made but before the process has been completed, the Administrative Separation Report must be completed and forwarded to VS/SS.
- If a V/T has already been administratively separated, the option of resignation is still available with the concurrence of the Deciding Official. The completed Administrative Separation Report must be forwarded to VS/SS.

4.6 Appeal

The appeal procedure is intended to ensure that the basic policies and procedures outlined in this Manual Section were followed, and that the decision to administratively separate a V/T was not carried out in an unreasonable, arbitrary or capricious manner.

4.6.1 Filing an appeal

Volunteers or Trainees may appeal an administrative separation decision by submitting a written statement of appeal. The written appeal may be mailed to PC/Washington or it may be presented during a PC/Washington consultation.

NOTE: A Trainee who is administratively separated from a U.S. training/staging event must mail his/her appeal and does not have the option of a PC/Washington consultation. The appeal must be postmarked within fourteen (14) calendar days of departure from the U.S. training site.

Mailed Appeal

A V/T who plans to appeal by mail should:

□ Indicate on the Volunteer/Trainee Statement, before departure from Post, his/her intention to mail in the appeal.

- Write an appeal (see Attachment A, "Administrative Separation Report").
- Mail the appeal to: Office of Special Services (VS/SS), Peace Corps, 1990 K Street, NW, Washington, DC 20526. The appeal must be postmarked within thirty (30) calendar days of termination date. In the absence of special circumstances determined by VS/SS, appeals will not be considered if they are submitted after this time period.

Appeal Consultation

A V/T who wishes a consultation at PC/Washington may present a written appeal of his/her administrative separation at that time. The V/T should:

- Be given a reasonable amount of time in country prior to departure to compose his/her appeal in the Volunteer/Trainee Statement (see Attachment A, "Administrative Separation Report").
- Submit the Volunteer/Trainee Statement to the Country Director for his/her response.
- Travel directly to PC/Washington. Paragraph 8.1.2 "Travel via Peace Corps/Washington for consultation" applies.
- Upon arrival at PC/Washington, present the written appeal to VS/SS staff. The V/T will meet individually with Appeal Board members during the Washington consultation in order to clarify points in the V/T's appeal statement.

NOTE: Under exceptional circumstances, such as safety or programmatic concerns, the Country Director (CD) may determine that the V/T should leave Post immediately, without first completing the appeal statement. In this case, the CD must confer with the Director of Special Services before making final travel arrangements. The V/T's appeal statement would then be sent to the CD for his/her response.

Termination Date
The termination date for a V/T who appeals via mail will be the day of departure from Post. If a V/T travels to PC/Washington for his/her appeal, the termination date will be the day the official consultation is completed.

4.6.2 Grounds for Appeal
A V/T must include all grounds and reasons supporting his/her appeal in the written appeal statement. Unless there are circumstances beyond his/her control, the V/T may only appeal on the basis of information contained in the formal written appeal statement. However, if the Appeal Board decides the V/T was unreasonably precluded from raising factual information on his/her behalf relevant to the grounds for administrative separation, the V/T will be permitted to make an additional written statement for the record. This additional statement must be sent to the Deciding Official for comment. If the Deciding Official writes a response to this additional statement, the response will be forwarded to the V/T for his/her information.

NOTE: A V/T who appeals an administrative separation and then requests, and is allowed to submit, a written resignation waives any future right to submit an appeal in person or in writing.

4.6.3 Appeal Board
The Appeal Board shall consist of at least three voting members and a non-voting representative from the Office of General Counsel. The Appeal Coordinator convenes the Appeal Board.

Volunteer Appeal Board

Member	Designated by	Role/Restrictions
Director of Special Services		**Chairperson and Voting Member**
Representative of Special Services	Director of Special Services	**Appeal Coordinator and Voting Member** Should not have provided guidance to country staff or Volunteer during administrative separation process
Representative of Region	Chief of Operations	**Voting Member** Cannot be the Country Desk Officer or Assistant in the Volunteer's country of service
Representative of General Counsel	General Counsel	**Non-voting Member** Provides guidance on legal issues; should not have provided guidance to country staff or Volunteer during administrative separation process
Representative of Medical Services	Director of Medical Services	**Voting Member** Only designated if separation is due to non-compliance with medical policy
Additional Peace Corps Staff	Chairperson of Appeal Board	**Voting Member** Designated as necessary; should not have provided guidance to country staff or Volunteer during administrative separation process

Trainee Appeal Board

Member	Designated by	Role/Restrictions
Representative of Special Services	Director of Special Services	**Chairperson, Appeal Coordinator and Voting Member** Should not have provided guidance to country staff or Trainee during administrative separation process
Representative of Placement	Director of Placement	**Voting Member** Cannot have had direct involvement in the Trainee's placement
Representative of Region	Chief of Operations	**Voting Member** Cannot be the Country Desk Officer or Assistant in the Trainee's country of service
Representative of General Counsel	General Counsel	**Non-voting Member** Provides guidance on legal issues; should not have provided guidance to country staff or Trainee during administrative separation process
Representative of Medical Services	Director of Medical Services	**Voting Member** Only designated if separation is due to non-compliance with medical policy
Additional Peace Corps Staff	Chairperson of Appeal Board	**Voting Member** Designated as necessary; should not have provided guidance to country staff or Trainee during administrative separation process

4.6.4 Review and recommendation

The Appeal Board conducts the review of a V/T appeal, assessing the administrative separation process against the criteria listed below. This review includes examination of the V/T statement, the Administrative Separation Report, and other supporting documentation requested by VS/SS or the appellant. During a Washington consultation, the review will also include individual interviews between members of the Appeal Board and the V/T. The Appeal Board will meet as many times as necessary to deliberate all issues of the case, and may postpone a decision if it determines

that it must first obtain additional information critical to the case.

Review Standards

A decision to administratively separate a V/T should not be arbitrary, unreasonable, or capricious. In order to meet this standard, the Administrative Separation Report should demonstrate that:

- The decision to administratively separate the V/T was based on one or more of the grounds contained in this Manual Section;
- The administrative separation procedures outlined in this Manual Section were complied with;
- The decision was based on an objective analysis of the facts; and
- The available facts reasonably support the conclusion to separate the V/T based on one or more of the grounds for administrative separation.

Recommendation

Once deliberations are complete, the Appeal Coordinator prepares a statement for the Appeal Board members' signatures, with the Board's recommendations, the basis for the recommendations, and suggested remedy(ies), if any. The recommendations must be supported by a majority vote; dissenting opinions should be attached to the majority statement. (If the Appeal Coordinator is a dissenting member, then the Board Chairperson or other member designated by the Board will prepare the majority statement.) The recommendation is submitted to the Reviewing Official (see paragraph 4.6.6) for a decision.

The General Counsel representative must review the Board's recommendation/dissenting opinions for legal sufficiency. If the recommendation is found to lack

legal sufficiency, the General Counsel representative will include a statement outlining his/her reasoning and recommendations.

4.6.5 Role of Inspector General
The Inspector General will be called upon to determine whether further investigation is needed if, at any time during the appeal process, allegations are made involving fraud, abuse, waste, or mismanagement, a violation of law (including sexual harassment), conflict of interest involving a Deciding Official or a significant violation of Peace Corps regulations.

4.6.6 Decision
The Appeal Board will forward its recommendation and case documentation to the Reviewing Official for a final decision on the appeal. The Reviewing Official for a Volunteer appeal is the Director of Peace Corps. The Reviewing Official for a Trainee appeal is the Director of Special Services.

The Reviewing Official may:
Deny the Appeal. The administrative separation will stand if a Volunteer/Trainee's appeal is denied.

Uphold a Volunteer Appeal. If a Volunteer's appeal is upheld, the Peace Corps Director may grant one or more of the following types of relief.

- The Volunteer may be re-enrolled for up to a full tour of service in a country other than that from which he or she was separated, without regard to the length of time he or she previously served. The Volunteer will be referred to VRS/Placement for priority placement to the first available assignment for which he/she qualifies.
- In exceptional circumstances, the Volunteer may be reinstated in his/her original country of service.

provided this is acceptable to the Peace Corps Post and the host country.

- The Volunteer may be granted an advanced Completion of Service (COS) date if the administrative separation occurs within one year of the original COS date. (See MS 281.)

Uphold a Trainee Appeal. If a Trainee's appeal is upheld, the Director of Special Services may grant one of the following types of relief.

- The Trainee may request a referral to VRS/Placement for priority placement to the first available assignment for which he/she qualifies.
- The Trainee may be granted a designation of resignation as the reason for termination on the Administrative Separation Report (Attachment A).

After a final decision has been made, VS/SS will notify the V/T and Deciding Official in writing of the decision, and will send the report containing the basis for deciding the appeal. The Appeal Board may provide the Deciding Official and his/her supervisor with a separate document that comments on the manner in which administrative separation procedures were implemented or documented by the Deciding Official or other staff members. In making its comments, the Appeal Board may recommend corrective action.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 04-5065

APPELLANT'S MOTION TO AMEND OPINION BY STRIKING A PEJORATIVE ALLEGATION NOT FOUND TRUE IN DISTRICT COURT ... AND REVISING AN AMBIGUOUS SENTENCE IN SAID OPINION

MICHAEL G. HOROWITZ, Ph.D. **Appellant,**

v.

PEACE CORPS **Appellee.**

Appellant *pro se* respectfully moves this Court to amend Opinion (10/28/05 Op.) by striking a pejorative allegation contained in its prefatory review of facts ... as well as revising an ambiguous sentence therein. The instant Motion is intended to operate to stay Mandate until 7 days after said Motion's disposition. Appellant conferred with government counsel regarding said Motion, but government counsel does not consent to it.

Appellant's reasons for motion are as follows:

Whereas:

1. Although appellant is a FOIA requester, this Court declined *de novo* review of the granting of Exemption 5 below, instead affirming the district court's findings as free of clear error (Op. at 4-5, 8);

2. The district court intended its evidentiary hearing to solely inform the disposition of Exemption 5 (App. 150)[1];

3. Although the district court specifically evaluated the credibility of former Tonga Post director Arturo Giron at hearing, it has not yet so evaluated former associate Post director Esther Sally Olsonoski (App. 147-60);

4. The rogue allegation lodged by Olsonoski at hearing that Horowitz admitted to "always carding" young people in the U.S. was never confirmed by Giron below nor pled by Peace Corps there. Nor was it found true by the district court (App. 133-60);

5. The citation of said allegation is gratuitous, pejorative, and prejudicial to Horowitz' related complaint in district court, whose proceedings will resume after disposition of the instant case (Op. at 11);

6. For dispository purposes, this Court's statement that the reported complainant was either 18 or 19 years old when lodging complaint (Op. at 2) would seem to sufficiently review the dispute regarding complainant's age that initially occurred at Post in March 1999. However, the sentence is sufficiently ambiguous as to leave the false impression that the complainant was an 'Atenisi student at the time of the alleged misconduct (See 6/20/05 Appellant's Reply at 32-33), an allegation neither pled by Peace Corps nor found true below. Appellant requests that the sentence be revised to

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[1] Both Parties betrayed this design in appellate brief: Peace Corps cited hearing in argument for affirmance of summary denial of the Privacy Act (3/30/05 Appellee's Br. at 34); Horowitz followed suit in argument for affirmance of summary denial of Exemption 6 (4/29/05 Appellant's Reply Br. at 27-54).

clearly indicate that the reported accuser was found to be a student at 'Atenisi High School only at the time of reportedly lodging complaint.

WHEREFORE, in the interest of fairness, Horowitz prays this Court amend Opinion by striking therein the fourth sentence of page 3 and revising the last sentence of page 2.

Respectfully submitted,

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